MISSISSIPPI LAW JOURNAL

The Dual Relationship of the Rules of Conflict of Laws in the Succession Field

EDWIN W. BRIGGS

The Judge Advocate General's Department

A. B. BUTTS

An Outline of Nazi Civil Law

WM. J. DICKMAN

January, 1943

VOLUME XV NUMBER 2

The Law of **PRIVACY . . . .**

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Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOLUME XV JANUARY, 1943 NUMBER 2

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Entered as second class matter at the Post Office at University, Mississippi, November 25, 1936.

Published in November, January, March, May, and September

$3.00 Per Annum 75 Cents per Current Number

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOL. XV. JANUARY, 1943 No. 2

THE DUAL RELATIONSHIP OF THE RULES OF CONFLICT OF LAWS IN THE SUCCESSION FIELD[1]

Edwin W. Briggs*

In a leading article[2] written some years ago, Professor Ernest G. Lorenzen sought to attack Story's generalizations to the effect that the territorial principle of law must be recognized as a basic fact in the Conflict of Laws, by asserting that much of the law even when Story wrote was "personal" in character rather than "territorial". To support that attack he relied heavily on the supposed law governing title transfer to chattels at that time. He asserts:

> "In its application to chattels, Story's first maxim does not give in the least an accurate picture of the rule of the Conflict of Laws prevailing at that time or now. The transfer of chattels was governed at the time Story wrote by the law of the situs neither as regards 'capacity', 'formalities', or 'essential validity'. Rights therein were governed as a rule by the law of the domicil of the owner."[3]

Then after conceding that the modern law generally operates territorially to transfer chattels *except as to* their devolution, he concludes,

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[1]This study originated in a graduate seminar in Conflict of Laws at Harvard in the spring of 1936, under Professor Joseph H. Beale. The major thesis appears to be fully as valid now as it did then. Various discursive studies in the Conflicts field appearing since that date fortify the belief that exploring that thesis further may prove quite profitable. For the most part, the particular portion of that study set forth in this paper retains the form it assumed immediately after that seminar, though if it were being written anew, somewhat different emphasis might be made at various places, in the notes as well as the body. For example, references to Professor W. W. Cook's extremely productive analyses and descriptions of the judicial process in resolving a conflicts problem, found in his various writings, may stress unduly certain differences that seem to exist between his views and those presented here, at the expense of other perhaps more basic agreement. However, that there is not complete agreement seems clear. Furthermore, in this particular study, very possibly the differences are more significant than the points of agreement. Presumably, this will be the first of a series of studies examining the thesis that the Common Law utilizes two basically different types of conflict of laws rules, serving fundamentally different purposes, in resolving a conlicts problem—in some fields at least. Very possibly such study will call eventually for a comparative examination of all so-called "explanations" of the "true or correct" judicial procedure. It will be time enough then to emphasize their points of agreement. Some of the implications of the above thesis, which seem to be tentatively justified from the present study alone, will be set forth briefly in concluding this paper.

[2]Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736.

[3]*Id.* at 738.

> "To say that the law of the situs has 'exclusive sovereignty and jurisdiction' with respect to chattels is, therefore, only a vague and meaningless statement, which does not express the existing law on this subject."[4]

As above noted, Lorenzen finally concludes that even today the law governing the succession or distribution of movables is "personal" in character, in that common law jurisdictions quite generally refer to the appropriate interest-creating rule at the domicil of the deceased owner rather than that of the situs to determine what heirs shall take and in what proportions. Evidently Lorenzen assumes that the "law of succession of movables" has been fully analyzed when he shows that the rule applying the law of the domicil has existed since before Story's time, and that the latter's maxims are completely refuted by so showing. More than fifteen years before Lorenzen's article, however, it had been vigorously asserted that the law really controlling the succession to or distribution of movables was the situs, and that it was *its* law which used the succession rule at the domicil for distributing an interstate's movables.[5] This proposition has since been affirmed by numerous authorities.[6] Though this may appear self evident to some,[7] actually at least in some respects the differences between this explanation of the law governing a conflict of laws problem and the traditional one, are very real—and basic. So, if an examination of the historical development of the law of succession or dis-

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[4]*Id.* at 739.

[5]Abbott, *Is the Renvoi a Part of the Common Law?* (1908) 24 L. Q. Rev. 133.

[6]Of course, this is by no means the first time that it has been shown that the situs really governs 2 Beale, Conflict of Laws (1935) § 303, p. 1031; *id.* § 2081, p. 934; Goodrich, Conflict of Laws (2nd ed. 1938) 432, 435; Carnahan, *Tangible Property and the Conflict of Laws* (1935) 2 U. of Chi. L. Rev. 345. Beale and Goodrich positively state the simultaneous existence of the two rules, (as to the situs, not "qua rule") but do not formally develop the implications of a "controlling-subsumed" relation. Carnahan cites the first two authorities to the same effect. But since his actual approach in the principal article, *supra* is predicated upon a "local law" conception, "controlling rules of jurisdiction" mean nothing to his conclusions. *Contra:* Minor, Conflict of Laws (1901) 300, particularly at n. 9. Imbued with the idea of a deadly struggle for superiority between the situs and the domicil, even in the present century Minor declares that the situs does not control in any sense of the word. Still he makes no pretense of considering "ultimate recognized power." *Cf.* Gardner, *The Decreasing Influence of the "Lex Situs"* (1934) 46 Jurid. Rev. 244-54. Gardner deals with "immovables," but he does not make any reference to the thesis of this paper.

[7]David Cohen, a former student of Judge Herbert F. Goodrich, read an earlier draft of this paper. The proposition that it is the "law" of the situs that applies the "law" of the domicil in intestate succession seemed so axiomatic in his training that he questioned whether the present paper does not ascribe to it an importance far out of proportion to its real significance. Three good answers are: (1) To the present this proposition has been stated almost altogether as a mere rationalization of the law. It immediately becomes much more significant if it can be shown that at all times common law courts actually have been controlled by principles which can be given full effect *only* by considering the rule that the law of the domicil governs is *exclusively* a rule of the situs. (2) Even after lip service is given to that proposition, the thinking of many authorities continues to be according to an entirely different pattern. (3) This study seeks to lay the foundations for a further examination of the implications contained in the above proposition.

tribution at the common law should support the conclusion that at all times the law of the situs has controlled intestate succession, it will do at least three things: (1) It will raise a very strong presumption that during this same period, the same law has governed transactions involving movables, generally. (2) It will establish that, whatever valid grounds there may be for attacking Story's maxims, the law governing movables cannot be cited to prove their error. (3) It will demonstrate the existence of two *different* Conflict of Laws rules necessarily applying at one and the same time to the problem of succession. Either these two rules (that the law of the situs "controls" succession, but that the law of the domicil "governs") are fundamentally incompatible with each other, or they serve basically different purposes.[8] Though this paper really is a preliminary study seeking to lay the foundations for a much broader inquiry into the existence of different categories of Conflict of Laws rules, serving fundamentally different functions, the immediate object simply will be to establish that this "dual category" of rules always has existed in the common law, at least as to the law governing succession to movables. We may state the precise question that we shall try to answer, thus: "Is the situs recognized as having final control to determine whether the domicil shall govern foreign movables, or does the domicil of the owner have such final power *i.e.*, does either have sole recognized legislative jurisdiction?" Hereafter, if a given rule appears to be used to recognize a "legislative jurisdiction," it will be called either a "power recognizing rule," or a "rule of controlling jurisdiction." If, on the other hand, it appears to be used by the legal system with the recognized power, in execution of that recognized power, it will be called a "choice of law rule."[9] We shall find later that identically the same rule *may be* so used by a given court, as to recognize *either* the situs,

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[8]See Note, *Law Governing Intestate Succession of Personality* (1929) 6 N. Y. U. L. Q. Rev. 456. The writer tries to harmonize these rules on the grounds that the common law rule as to the domicil governing, is applicable generally, but that on occasion a "controlling" policy of the situs may operate to defeat the general rule. The *Restatement* gives very much the same rationalization. Restatement, Conflict of Laws (1934) § 303. While this is a partially correct statement, in its application, it becomes as misleading as if entirely wrong. The "policy" of the situs is governing at all times. Ordinarily, its policy declares that the domiciliary law shall govern, but, if it sees fit, it may declare a *different* policy.

[9]In this study (and in any field where fully developed) these two basically different conflict of laws rules have subtly different connotations from those generally associated with them heretofore. It is to be noted that the only rule actually applied by the forum is its power recognizing rule. The "choice of law" rule is *only* in the law of the state with the recognized power and is subordinated or subsumed to its rule of controlling jurisdiction. Traditionally, the phrase, "choice of law" is a question begging expression. It may ultimately come to indicate simply which of several possible *procedures* the state with the recognized power chooses to utilize to select and formulate its interest creating rule. It happens that the "choice" of common law states has been the domiciliary law to pass intestate succession. Conceivably, it might have chosen its own ordinary internal succession rule—or it might have formulated a *special* rule found only in its internal body of law but applicable only to a conflicts situation. Or it might have chosen to apply its own rule *or* that of the domicile in the alternative had that best served the dominant policy of its law.

or the domicil as having this ultimate control. So our immediate problem is to decide how the majority of courts have, in fact, used this rule.[10]

Though this study is particularly interested in the "common law" governing succession, it should point out that at least by the latter half of the eighteenth century, both the civil[11] and the common law approved the essence of the Latin maxim, *"mobilia sequuntur personam,"*[12] although, as exemplified by the Scottish Civil Law, discussed *infra,* the rule that the situs of all properties control legal interests therein, had profoundly influenced the civil law long before that time. But it cannot be too strongly stressed that, however the civil law may have assimilated this "new" rule, that assimilation cannot be taken to indicate its position in the common law.[13] To the civil lawyer, the adjustment of the new rule with the old may have taken on a very different complexion from that in the English common law. Accustomed as they were to thinking in terms of "legal concepts" which are controlling, a factual fiction quickly became a legal fact. To them, determination of the *legal* situs of chattels was quite independent of the *physical* situs.[14] Hence they might easily come to treat the domicil

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[10]This proposition is based on what may be called (for want of a better term) a functional analysis of the rules utilized by the courts. Such analysis may be extremely helpful in answering the question, "Precisely what is a conflict of laws rule anyway?" Surely such question needs asking badly in view of the recent conclusion of some leading authorities that the rule that the law of the domicil governs intestate succession is not a conflict of laws rule at all but rather an integral part of the *internal* law of the situs.

[11]Since the common law system of Conflict of Laws owes so much to Civil law writers, directly through Savigny, and indirectly through Story, it may be objected that any adequate inquiry of the common law should begin with a study of the Civil Law writers, particularly since the maxim "mobilia sequuntur personam" has influenced both. However, the point made here is that, even though we were to find precisely the same stated rule formally governing in both systems, it would by no means follow that the two systems *had put it to the same use.*

[12]Bar, Private International Law (Gillespie's tr. 1892) 27, 488-98; Savigny, Private International Law and the Respective Operation of Statutes (Guthrie's tr., 2d ed. 1779) 175-76, esp. n. 2. *Cf.* statement in Note (1929) 6 N. Y. U. L. Q. Rev. 456, to the effect that, "As to intestate succession, there was very little hesitancy or doubt, starting from the Romans, in stating that the descent of personal property, wherever situated, must be taken from the country of the intestate's domicile," with Bar, *op. cit. supra,* 798 *et seq.*

[13]In addition to the uncertainty in continental law as to what extent the phrase *"Mobilia* . . . etc." furnishes a basis for a power recognizing rule on the one hand, or a choice of law rule on the other, there is the further uncertainty as to whether the "personal" law should be based on domiciliation or on nationality. In the French law there is much conflict of authority. Niboyet, Précis Elimentaire de Droit International Privé (1928) §§ 372-74; Lerebours-Pigeonnière (2d ed. 1933) § 361; Boeuf & Boutaud, Droit International Privé (4th ed. 1912) 259-66; Arminjon, Précis de Droit International Privé (1931) 110-113. Other jurisdictions assume that the maxim gives effect to the nationality. As to the extent of the variation and the cause, see Bar, Private International Law (Gillespie's tr. 1892) 798-99; Boeuf & Boutaud, *op. cit. supra* at 260 *et seq.*

As exemplified for a time in the Scottish law mentioned below in note 17, sovereigns attempted to assert jurisdiction over the same object, both on the basis of nationality, and as the situs. This was the generally accepted rule: Bar, Private International Law (Gillespie's tr. 1892) 27. Exactly the same problem confronted them as modern writers discuss—"Which is the more significant 'contact' of a movable with a given law, its actual situs or its legal relation to its owner."

[14]Arminjon, Précis de Droit International Privé (1931) 112 *et seq.*

as having the sole recognized legislative jurisdiction described above.[15] On the other hand as will be shown later, in practically every English case, the principle that movables followed their owner, was incidental to a "policy of convenience" and to the general influence of the idea of a "universally binding conflict of laws system." Invariably, the fiction contained therein was recognized.

Just before the turn of the nineteenth century, a series of English cases[16] conclusively established the rule that the "law of the domicil" of the owner should govern succession rights to movables. The controlling question here, however, is not as to the content of the normally governing choice of law rule but rather, "Who was held to have the power to determine what that rule should be?" Without exception, these first cases were appeals from Scotland to the English House of Lords, shortly after the subordination of the former's courts to the judicial system of England. The Civil Law of Scotland had categorically embraced the conception that all laws dealing with "things" were *real,* and so governed by the situs[17] —evidence that this "medieval" idea still controlled many legal minds of that time. Numerous cases may be cited establishing this as the Scottish

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[15]A most important contributing factor in giving the domicil control over succession on the continent, was the legal institution of *"universitas"* in Roman inheritance law. Bar states that this is the decisive cause and the only real justification for *permitting* the domicil to govern. BAR, PRIVATE INTERNATIONAL LAW (Gillespie's tr. 1892) § 362, p. 798. It is not intended to indicate the extent to which pure conceptualism actually shaped the continental law, but rather to show that such difference existed in judicial approach, as well as underlying premises, in the Civil Law, as to establish that it cannot be relied upon to show the state of the common law. *Cf.* Present German law on succession as expressed in Wolff, *Internationales Privarecht,* in 15 ENCYKLOPADIE DER RECHTS-UND STAATSWISSEN-SCHAFT. As to the German law, it seems that nationality generally governs succession to all property, *id.* at 141-42. Since the time of Savigny, however, situs governs title inter vivos, *id.* at 105-08. The remarkable part of the Germanic law, however, is found in Sections 27 and 28 of the Supplementary Section to the Code, BURGERLICHES GESETZBUCH NEBST EINEUHRUNGSGESETZ. (1930). After expressly adopting the "renvoi" in a number of enumerated cases, including inheritance, Section 28, *just as expressly bows to any contrary rule or law existing at the situs of such property, real or personal.* Evidence of ultimate exclusive jurisdiction of the situs hardly could be stronger. Wolff also comments on Section 28, at p. 52 of his work, *supra.* There has been no effort made to check on any changes in this law occuring in the German Codes in the latter years of the Nazi regime.

[16]Bruce v. Bruce, 2 Bos. & P. 229 n., 126 Eng. Rep. 1251 n. (H.L. 1790); Balfour v. Scott, 6 Bro. P.C. 550, 2 Eng. Rep. 1259 (H.L. 1793); Graham & Bempde v. Johnstone, 3 Ves. Jr. 198, 30 Eng. Rep. 967 (Ch. 1796); Ommanney v. Bingham, 3 Appeal Cases (Paton) 448 (Scotland 1796); Somerville v. Somerville, 5 Ves. Jr. 750, Eng. Rep. 839 (Ch. 1801); Sill v. Worswick, 1 H. Bl. 665, 690, 126 Eng. Rep. 379, 392 (C.P. 1791) Lashley v. Hog, 4 Appeal Cases (Paton) 581 (Scotland 1894), is a case assuming the rule. For two earlier cases indicating the trend see: Thorne v. Watkins, 2 Ves. 35, 28 Eng. Rep. 24 (Ch. 1750); Pipon v. Pipon, Amb. 25, 27 Eng. Rep. 14 (Ch. 1774).

[17]Scottish law asserted control over chattels, both on the basis of nationality of the owner and of location in Scotland, for a time, but finally gave up the former. Henderson's Children v. Murray, 6 Morison's Dict. Dec. 4481, Durie 88, 1 Fol. Dict. 320 (Ct. Sess. 1623).

rule,[18] but one of the most important is one in which the Scottish court recognizes that the law of Hamburg governs the succession to certain chattels located in Hamburg, owned by a Scottish domiciliary.[19] So, in noting the incorporation of an additional (or new) rule into the common law, by the House of Lords, the prerequisite to understanding that law, is to determine whether such new precept is chosen to *displace* a previous rule, or was merely to serve as a *complement* to that other rule.[20]

An important factor in interpreting these cases by the House of Lords, was that they were thinking in terms of the most desirable law of the then developing Empire. They were concerned primarily with the most "practical" rule. Their word was supreme, as to the various subordinate political units of the Empire;[21] so they did not have need for choosing between the situs and the domicil.[22] Resolution of conflicting powers rather was the question, simply determining the "choice of the most convenient law" for the majority of cases. In other words, they began their decision at the *level* of "choice of law" rather than "rule of controlling jurisdiction." For that matter, the same is true of the bulk of relevant cases both in American and in English law. However, that fact in no way questions the existence of the "rule of controlling jurisdiction."

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[18]Henderson's Children v. Murray, 6 Morison's Dict. Dec. 4481, Durie 88, 1 Fol. Dict. 320 (Ct. Sess. 1623); Melvil v. Drummond, 6 Morison's Dict. Dec. 4483, Durie 723 (Ct. Sess. 1624); Younger Children v. Eldest Brother and Son of Crawford, 6 Morison's Dict. Dec. 4486, Fac. Col. No. 100, p. 258 (Ct. Sess. 1774); Purves v. Chisholm, 6 Morison's Dict. Dec. 4494 (Ct. Sess. 1611); Shaw v. Lewis, 6 Morison's Dict. Dec. 4494, 1 Stair 252 (Ct. Sess. 1665); Brown and Duff v. Bizet, 1 Stair 398, Dirleton 10 (Ct. Sess.); Brown v. Brown, Kilkerran 199 Falconer 11 (Ct. Sess. 1744); Morison v. Earl of Sutherland, Kilkerran 209 (Ct. Sess. 1749); Mortimere v. Lorimer, 2 ERSKINE, INSTITUTES OF THE LAWS OF SCOTLAND (3rd ed. 1793) 645 (1770) (basis of decision not clear); Davidson v. Elcherson, Faculty Dec. of Ct. of Sess., Jan. 1778-May 1783, p. 1 (1778) (leading case); Henderson v. M'lean, Faculty Dec. of Ct. of Sess., Jan. 1778-May 1783, p. 4 (1778). In Appendix I to Balfour v. Scott, 6 Bro. P.C. 550, 566, 2 Eng. Rep. 1259, 1271 (H.L. 1790), counsel tries to distingush away all of these cases—with little success however.

[19]Davidson v. Elcherson, Fac. Dec. of Ct. of Sess., Jan. 1778-May 1783, p. 1 (1778). *Cf.* Lorenzen's statement as to the early law, quoted on p. 77, this article.

[20]Of course, to those who refuse to recognize the existence of "rules—or principles—of jurisdiction," and who ignore the problem of "jurisdiction," this question can make no sense; so answer to it will mean nothing to them. We are not seeking a "logically ideal structure" based upon preconceived assumptions as to the "nature of legal rights," but rather would try to explain what the courts actually have decided, with the authoritative materials motivating those decisions, so far as they can be ascertained.

[21]Recognition of this distinction is made in Dubois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions* (1933) 17 MINN. L. REV. 361, 374-75: "Eliesco . . . sharply distinguishes between (1) conflict such as those between the states of the United States, and (2) those between France and Alsace, and a mother country and a colony, situations in which there is a constitutional power in a central legislature to prescribe the conflicts rule, or to require uniformity of law."

[22]True, the situs, Scotland in these cases, had held otherwise, but it now was part of the Empire, subject to the decision of the House of Lords. See Thorne v. Watkins, 2 Ves. 35, 28 Eng. Rep. 24 (Ch. 1750), for discussion of effect of the "Union" of two sovereigns, on the law of Scotland.

Furthermore, objective evidence in other cases, dealing with collateral questions incidental to the ownership of chattels,[23] seems to be equally helpful in determining whether the courts actually submit to such "rule of jurisdiction" recognizing ultimate control in the situs. Such submission may be found in determining the respective powers of administrators—strictly territorial.[24] An even more significant indication of such local control is found in the declaration that the situs must decide whether a property is "real or personal" (movable or immovable).[25] Such power is equivalent to absolute control over the method of succession to it, since it is admitted that the situs governs immovables.[26]

Of more than ordinary significance is the fact that text writers, even before 1800 fully recognized the ultimate exclusive jurisdiction of the situs in the succession field. The opinion of publicists of the time is summarized in Burge, *Colonial and Foreign Laws,* in referring to the scope of the rule that the law of the domicil governs the title to movables, generally:

> "There is an entire concurrence amongst them in considering that the title to movables, or the validity of any disposition of them is not governed by the law of their actual situs.
>
> "This, which may be regarded as a general rule, is subject to this qualification, that the law of the country in which the movable may be actually situated has not prescribed some particular mode by which the movable can be transferred."[27]

Note that this statement of the law recognizes actual control in the situs, regardless of for what purpose. Apparently Burge intends to say that other states generally, will recognize such ultimate power in the situs.

True, in none of these earlier reported cases, apparently, has the court or the House of Lords had to answer expressly this question, "By recognizing the effective law of the domicil as governing in this case, do you thereby intend to say that the situs of the chattel no longer has a recognized power to control the title to that chattel by a contrary rule?"

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[23]Attorney Gen. v. Dimond, 1 Tirwh. 243, 248-49 (Ex. 1831); *In Re* Ewin, 1 C. & J. 151, 155, 148 Eng. Rep. 1371 (Ex. 1830). It might be claimed that the last case assumes that the local administrator supervises all movables. Even so, it does not indicate whether he does it independently of the will of the situs. Any uncertainty on this score is settled by Atty. Gen. v. Dimond, *supra.* The differences of opinion among some leading authorities as to whether administration is unitary in nature, does not become an issue here, because any such character that might be affected, would be through a "choice of law" rule of the situs, in view of the numerous assertions of control by the situs, indicated shortly.

[24]3 BEALE, CONFLICT OF LAWS (1935) §§ 471.5, 471.6, 472.1, 473.1, 474.1.

[25]Johnstone v. Baker, 4 Madd. 474 n. 56 Eng. Rep. 780 n. (Rolls Ct. 1817); Jerningham v. Herbert, 4 Russ. 388, 38 Eng. Rep. 851 (Rolls Ct. 1829); Allen v. Anderson, 5 Hare 163, 67 Eng. Rep. 870 (V.C. 1846).

[26]*Cf.* 2 BEALE, CONFLICT OF LAWS (1935) 933-4. Though championing the proposition that the forum must decide all questions of "characterization," Beale readily agrees that the situs of tangible property, when movable or immovable, must determine how it shall be inherited, and further, that such situs may declare that movables shall be treated as if they were immovables for such purpose. See note 136 *infra.*

[27]3 BURGE, COLONIAL AND FOREIGN LAWS (1838) 751.

But in view of the evidence considered, it seems plain that, when the House of Lords selected the "law of the domicil" to govern the succession to movables, they did it as a "choice of the law of the sovereign" assuming the situs to be in agreement with that choice, rather than as a determination of ultimate legislative jurisdiction. Indeed the situs was very likely to be in the Empire somewhere, making the English judiciary the final voice as to what was its law. Two English cases of the nineteenth century state categorically that the situs governs[28]—but the English law must be examined in detail in a separate study.

The law on the question in the United States at this early period is much clearer yet. Without attempting to resolve finally, the law of foreign jurisdictions it is submitted: (1) that a controlling principle in our law at that time was the mutual delimitation of sovereign power; and (2) that, reasonably interpreted, the generalizations and conclusions of Story accurately expresses the basis upon which that delimitation was predicted, at least for stating the law governing title to all chattels. A brief reference to the first two of his "maxims", much criticized recently,[29] can not be avoided. They are as follows:

> 1. ". . . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[30]
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> 2. ". . . . no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects, or others."[31]

Story then recites a qualification to the second, popularly recognized, to the effect that;

> ". . . . although the laws of a nation have no direct binding force, or effect, except upon persons within its own territories; yet every nation has a right to bind its own subjects by its own laws in every other place."[32]

He continues by limiting very seriously this last observation by the following:

> "Such laws may give rise to personal relations between the sovereign and subjects, to be enforced in his own domains; but they do not rightfully extend to other nations. . . . *A state has just as much intrinsic right, and no more, to give to its own laws an extra-territorial force, as to the property of its subjects situated abroad,* as it has in relation to the persons of its subjects domiciled abroad. . . . When,

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[28]Lynch v. Provisional Government of Paraguay, L.R. 2 P. & D. 268 (1871); Re Aganoor's Trusts, 64 L. J. Ch. (N.S.) 521 (1895).

[29]*Cf.* Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368.

[30]STORY, CONFLICT OF LAWS, (2d ed. 1841) § 18, p. 19. (The first edition is identical.)

[31]*Id.* § 20, p. 20.

[32]*Id.* § 21, p. 21.

> therefore, we speak of the right of a state to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of other nations within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons *and things* within its own territory according to its own sovereign will and public policy."[33]

If Story erred in making these basic generalizations,[34] it was in stating them in terms of supposed inherent qualities of sovereignty, rather than as a mere descriptive of the basis upon which the courts of that time actually limited recognized power. That is, it was in so stating them that they could readily be transmuted into "inherent *universal* qualities of law itself," so as forever to bind law by the static conceptions of sovereignty of a given time and place, and so as to cause them to seem to control situations that they do not actually control.

But the real problem here is not whether Story spoke eternal verities, but, rather, whether he correctly described the controlling basis of law as of his time. It seems that his observations are soundly predicated, both in the facts of the scope of actual physical power of sovereign states applied at least to tangibles, and in the courts' transmutation of those facts into legal principles psychologically. As observed above, Professor Lorenzen has flatly denied the validity of any of these maxims by pointing out that the "domicil" actually was held to "govern" the title to all chattels, at the time that Story was writing. Though this critic does not note it, Story gives much more space to discussing this rule, than he did his "maxims." In the light of that fact, it would seem that the proper approach here would be an attempt to harmonize these apparent inconsistencies (if such they be) in Story, rather than an attempt to cancel the one by not mentioning the other. After recognizing the rule as to the domicil, and quoting foreign authors at great length on the correctness of it, Story concludes,

> "The probability is, that the doctrine itself had not its origin in any distinction between real laws, or personal laws, or in any *fictitious annexation* of them to the person of the owner, or in their

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[33] *Id.* § 22, p. 23. Italics supplied.

[34] Story says that a third maxim flows from the first two: "Whatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." *Id.* § 23, p. 23. This so-called maxim is different from the first two in that it very nearly approaches a rationalization of the first two, and is the basis for the theory of "comity" as controlling conflicts. The first two maxims simply are declarations as to the extent of physical power of the sovereign, with the implication that law must be developed accordingly. Since the third maxim is not pertinent to our immediate study, it will be left out of our consideration. *Cf.* Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368.

incapacity to have a fixed situs; *but in an enlarged policy,*[35] *growing out of their transitory nature and the general convenience of nations".*[36]

He approves of the rule as an "instrument of policy."[37] (This last is very significant for our purpose).[38] Further on he adds, "And this is regularly true [that the owner's domicil governs all transfers of movables] *unless there is some positive or customary law of the country, where they are situate, providing for special cases."*[39] He thereupon cites approvingly from an early Pennsylvania case to the effect that, "Every country has a right of regulating the transfer of all personal property within its territody; but when no positive regulation exists, the owner transfers it at his pleasure."[40] Finally, Story makes this pertinent observation, regarding the law governing immovables:

"but in addition to these . . . all other things, though movable in their nature, which by the local law are deemed immovables, are, in like

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[35]Of course, the basis of "comity," which Story used to harmonize these two rules, is much criticised today. It is thought that reliance on that conception is not necessary to the recognition of the actual existence of the "controlling-subsumed" relation existing between some conflicting rules. It is historically significant, though, that the rule making the domicil govern succession, grew up in the common law during the period when "comity" was playing a very powerful influence in the law—not necessarily in the sense of "reciprocity," however.

[36]STORY, CONFLICT OF LAWS (2d ed. 1841) § 379, p. 311. Italics supplied.

[37]The extent to which Story vacillated between approving a rule based upon "policy," and one founded exclusively upon what appears to be absolute conceptions of ultimate jurisdiction rooted in the fact of "territorial limitation" of sovereignty, is revealed in his discussion of the proper law to govern assignments in bankruptcy. After approving the rule that voluntary assignments should be governed by the domicil in the same manner as succession, he admits that, "It is true, that any nation may adopt, if it pleases, a different system, and prefer an attaching domestic creditor to a foreign assignee or to foreign creditors. But such a course of legislation can hardly be deemed consistent with the general comity of nations. . . . " STORY, CONFLICT OF LAWS (2d ed. 1841) § 406. On the other hand, for assignments by operation of law, he flatly selects the various laws of the particular situs: "But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property, except that, which is within its own territory. This makes a solid distinction between a voluntary conveyance of the owner, and an involuntary legal conveyance. . . . " *Id.* § 441. The same distinction might be made as to wills, in contrast to devolution by intestacy, but it has never been seriously done. Story's argument here, though, applied to the law of succession, would result in just the opposite to the actually existing rules. Thus is revealed the speciousness and superficiality of many of the rationalizations made by Story, as well as other accepted authorities.

[38]Any discussion of the significance of Story's use of the maxim, *mobilia sequuntur personam* must take into account the import of the quotations just given from other sections of Story's work. *Cf.* Carnahan, *Tangible Property and the Conflict of Laws* (1935) 2 U. of CHI. L. REV. 345-46, esp. n. 3; 2 BEALE, CONFLICT OF LAWS (1935) 978. The latter holds Story responsible for the introduction of the maxim *"mobilia. . . . "* into the common law. It may be suggested, however, that he was merely trying to formalize the spirit of numerous English cases before his writing, one of which states that, "it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner." Sill v. Warswick, 1 H. Bl. 665, 690, 126 Eng. Rep. 379, 392 (C.P. 1791).

[39]STORY, CONFLICT OF LAWS (2d ed. 1841) § 383, p. 314. Italics supplied.

[40]*Id.* at 314, n. 5, quoting from Milne v. Moreton, 6 Binn. 352, 361 (Pa. 1814).

manner, governed by the local law. For every nation, having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character, which it shall choose; and no other nation can impugn, or vary that character."[41]

So we accept Story's "maxims" (in relation to the problem of what law governs movables,) not because they enunciate immutable principles but rather for two reasons: (1) In so far as the law ever gives legal effect to "facts," it would seem that it must recognize the "fact of physical control over the chattel."[42] (2) The maxims at least for our particular field, accurately depict the controlling bases of judicial opinion and legislative action at the time of Story's writing, and in even more marked degree since then.[43] It now becomes necessary to justify the last statement.

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[41]STORY, CONFLICT OF LAWS (2d ed. 1841) § 447.

[42]In Curry v. McCanless, 307 U.S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339, 123 A.L.R. 162 (1939), Justice Stone more than justifies this statement by the following: "The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles, located within its territory, affords adequate basis for an exclusive taxing jurisdiction. . . . Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the original of the rights. . . . Obviously, as sources of actual or potential wealth —which is an appropriate measure of any tax imposed on ownership or its exercise— they cannot be dissociated from the persons from whose relationships they are derived. These are not in any sense fictions. They are indisputable realities." *Id.* at 364, 365-66. Since the taxing field is not necessarily controlled by principles dominating conflicts rules generally, it is all the more significant that the United States Supreme Court has considered the exclusive power of a government "to possess and to exclude others from possessing tangibles" as of itself a sufficient basis for establishing a constitutional exclusive power to tax—at the same time that it readily recognizes a basic difference between chattels and intangibles for taxing purposes. Stone only states explicitly what has been at least implicit in practically all common law decisions on the subject.

And neither the fact that the "pure fact of power" is qualified by the concept of "situs" (i.e., that the recognized power is limited to the "situs" rather than to a state accidentally having such power at a given moment) nor the difficulty of applying that concept to chattels in some cases, impairs in any way the validity of the above conclusions.

[43]For our purposes, at least, the criticisms of Story's maxim, in Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws* (1931) 31 COL. L. REV. 368, are not apropos. To us, the maxims simply are a declaration of who shall have ultimate recognized power to determine the "bundles of rights, privileges, powers and immunities," incident to ownership. Of course, Story knew that anyone beyond the local territory, interested in the local property (notice the word used is "property," not "things"—which implies the legal interest in addition to the "thing") would have his property interests affected by any local legal action affecting the local property. In view of this undoubted knowledge, the very manner of stating the maxim indicates that the important thing to Story was the establishment of a "recognized power" rather than the avoidance of a "technical violation" of territoriality, by acting upon a pure abstraction (i.e., the legal relation), which may or may not be held to extend beyond the local borders, depending upon pure rationalization. Cook's and Hohfeld's emphasis upon "relationship" to the exclusion of the thing itself, as the significant elements in the law, fails to take into any account legally, this fact of "recognized

One of the significant things about Story's discussion of the law governing property interests, is that he concludes that the same "ultimate recognized power" governs them all alike, *inter vivos,* or *post mortem.*[44] In so far as the "fact of physical control" is the dominating factor, in this law, clearly such must be the law. There seems no reason for distinguishing between movables and immovables (other than the fact that the former may be subject to one "physical power" when the interests are affected, and to another at trial). In stating that *Cammell v. Sewell,*[45] an English case decided in 1860, was the first (common law?) case to rule that the law of the situs should govern even *inter vivos* transactions,[46] Lorenzen seems to assume that the governing rule as to succession remained at all times that of the domicil, conceding only that,

> "During the latter half of the last century a more controlling influence has been given by Anglo-American law to the law of the situs with respect to chattels than theretofore, but only where the transfer was inter vivos, and did not result from operation of law."[47]

Judging from this statement, it would seem that Lorenzen assumes that there have come to be two distinct controlling rules regulating the transfer of title to property—the first governing such transfer by act of the parties, it being territorial, and a distinctly different one governing all transfers *post mortem.* It is submitted that such assumption is not justified by the cases. Actually, of course, Lorenzen is discussing the problem only at the "choice of law" level, apparently not recognizing at all the significance of the power recognizing rule in the problem. However, not only do numerous decisions, concerning both *inter vivos* and succession cases, give trenchant recognition to the power recognizing rule that the situs actually controls, long before *Cammell v. Sewell,* but notably a series of Louisiana cases (not to mention the Scottish cases of the 18th Century) explicity select the situs to ultimately govern *inter vivos* transactions. At

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power," and thus goes at least as far astray in failing to include all of the elements involved in an expression of the law, on the one hand, as Story did on the other. In conclusion, it might be pointed out that the references in the maxims, to "property" and to "persons" are absolutely independent of each other, so that, statements regarding the latter cannot be pointed out as inconsistent with those referring to the former—they are implicitly, mutually exclusive. Of course, Cook's position is that they cannot be so, because the law always acts upon "relationships" with individuals participating therein, and nothing else. Cook, *supra* at 380-81. But the process of recognizing a power must be resolved before it can be admitted that *any* legal relationship *can* be created. Of course, it has long been recognized that the attempted distinction between "statut real" and "statut personal" was futile. Professor Beale used this as a starting point, in determining to state the law exclusively in territorial terms.

[44]Bar, Private International Law (Gillespie's tr. 1892) 488 *et seq.;* Savingy, Private International Law and the Respective Operation of Statutes (Guthrie's tr., 2d ed. 1779) 174 *et seq.*

[45]5 H. & N. 728, 157 Eng. Rep. 1371 (Ex. 1860).

[46]Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 Yale L. J. 736, 741 n. 21.

[47]*Id.* at 738-89.

least as early as 1817,[48] Louisiana ruled that her law, as the situs of the chattel, should govern transfers attempted elsewhere. In this particular case, none of the interested parties was domiciled in Louisiana, making the decision the more significant, in the light of Professor Stumberg's explanation of these decisions. Several other Louisiana decisions[49] re-affirmed this rule—all going back to an 1814 decision for their "governing" principle.

As to the succession cases of this period, in the United States, though they generally applied the law of the domicil, they repeatedly asserted that the ultimate recognized power to determine how that property should pass was in the situs of that property. One of the few cases revealing the full scope of the problem of applying the rule that domicil governs the devolution of personal property is an early Connecticut case.[50] It involved the rights of a Connecticut heir of a Vermont intestate to property located in Connecticut, at the death of the owner. The local resident was contesting both the application of the Vermont law to determine his rights and the sending of the residue value to the Vermont administrator for distribution. After approving a still earlier state decision,[51] which had applied our principal common law rule, the court adds: "It is true, that it is in the power of every sovereignty, and within the constitutional powers of the states or this Union, to repudiate this salutary doctrine, in its application to themselves, or to modify it."[52] It concludes with the opinion that the court of the situs of the property may itself distribute, or may send to the

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[48]Norris v. Mumford, 4 Mart. 20, 25-26 (La. 1815).

[49]Ramsey v. Stevenson, 5 Mart. 23 (La. 1817); Fisk v. Chandler, 7 Mart. 24 (La. 1819); Olivier v. Townes, 2 Mart. (N.S.) 93, 102 (La. 1824); Lanfear v. Sumner, 17 Mass. 110 (1822) *Semble.* Professor Stumberg offers the *Townes* case, apparently as the earliest case. . . . "in which the domiciliary law was definitely held not to control [movables]." STUMBERG, CONFLICT OF LAWS (1937) 358 *et seq. Ramsey v. Stevenson, supra,* just as definitely so held, and was decided in 1817, seven years before the Townes case. Furthermore . . . the former case is much more important for our purpose than the latter, because none of the interested parties was a Louisiana resident. Stumberg tries to explain away the import of *Olivier v. Townes,* on the ground that the court simply preferred Louisiana creditors as a matter of policy. He further insists that the law governing ownership of chattels, depends on which of four different classes of cases the court has to adjudicate. To answer these two explanations in reverse order (as applied to these early Louisiana cases): (1) It is evident that Stumberg at this point, is talking at the choice of law level rather than the rule of jurisdiction level; (2) the *Ramsey* case, which he ignored, rigidly applies the rule that the situs governs, even though no Louisiana citizen was interested in any manner whatsoever in the property. The spirit of this case, with two earlier ones, upon which it relies, clearly is that no person acquires a proprietary interest in a chattel, regardless for what purpose, without delivery, in Louisiana (a civil law state, however). See Norris v. Mumford, 4 Mart. 20 (La 1815); Burnford v. Syndics of Brooks, 3 Mart. 22 (La. 1814).

[50]Lawrence v. Kitteridge, 21 Conn. 577 (1752).

[51]Holcomb v. Phelps, 16 Conn. 127, 133 (1844). The plaintiff in this case tried to establish complete lack of control over the chattel by the situs. The court answered with, "It is apparent, that the goods of a person who dies intestate, must necessarily be subject to be disposed of, under such regulations as the sovereign authority of the country the situs shall judge reasonable and proper."

[52]Lawrence v. Kitteridge, 21 Conn. 577, 584 (1852).

principal administrator, the residue, at its discretion. In this case, we find vaguely defined the elements of two rules though the one as to the "power" of the situs (recognized power) to change the common law rule, is not formally expressed as a rule.

McCollum v. Smith,[53] the case which first suggested this study, with a sister case,[54] makes these two rules, in the same legal system, much more apparent. They are Tennessee decisions decided in 1838 and 1845. It is to be noted that it is the domicil of the owner recognizing this exclusive power in the situs in both cases. In an action for an accounting by the administrator, the first of these two cases had to decide what law governed the devolution of slaves located in Louisiana, at the death of the owner, domiciled in Tennessee, the slaves later having been brought into the latter state. It has a direct bearing upon the general problems of "renvoi", and "qualifications", but for our present purpose, it decided that the "situs" of a given property was controlling to determine whether it was "movable" or "immovable."[55] This is not quite the equivalent of saying that the situs determined whose law governed the devolution of that property, but it recognizes a similar power in the situs. In the second case, the court had to decide whether certain slaves, in Arkansas, should pass as personalty to the husband, at his wife's death, under the Tennessee law, their domicil, or should pass to the mother of the deceased wife, as realty, under the Arkansas law, whose succession statute declared that they should pass as real estate. This statute forthrightly changes the common law rule of devolu-

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[53]Meigs 342 (Tenn. 1838).

[54]Jones v. Marable, 6 Humph. Rep. 116 (Tenn. 1845).

[55]*Cf.* 2 BEALE, CONFLICT OF LAWS (1935) 933-34. Williamson's Adm'rs v. Smart and Kilbee, Cam. & Nor. 146 (N.C. 1801), entails the same problem of interpreting a Virginia succession statute, as the situs, by the North Carolina court, as the domicil. It does not deny that Virginia might control its own slaves, so far as Virginia courts are concerned, but it is not clear whether North Carolina would feel bound by such statute. The case *can* be distinguished from our principal Tennessee case on the ground of interpretation of the Virginia statute. To be consistent, with our emphasis upon the philosophical and historical content behind the decision, however, it must be admitted that North Carolina would at least impose a very strong presumption that the domicil governs—almost, if not quite as a rule of jurisdiction. *Cf.* 2 BEALE, *op. cit. supra* at 937. Another case, construing the state statute very narrowly so as to preserve the common law rule favoring the domicil, is Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41 (Ky. 1831). It is not so strong as the North Carolina case, though, because it gives the situs ultimate power to absolutely control. This case also supports Professor Beale's declaration that, "The distinction between movable and immovable for the purposes of the Conflict of Laws must be a distinction in fact." 2 BEALE, *op cit. supra* at 934. This position is justified by the assumption that "Louisiana's law," and the Conflict of Laws are two independent subjects, with the latter based upon unchanging conceptions. But is this consistent with the position that Conflicts is complete and autonomous within each legal system? It may well be doubted whether any jurisdiction will submit to such unchangeable conceptions as to what constitutes "immovables," even in its Conflict of Laws rules. *Cf.* De Sloovere, *On looking Into Mr. Beale's Conflict of Laws* (1936) 13 N. Y. U. L. Q. REV. 333-351. Once having recognized controlling jurisdiction in Louisiana over both movable and immovable, the physical characteristic of the property is no longer important. The forum is concerned only with how Louisiana law treats the property.

tion, making no pretence of giving the slaves the general legal status of "immovables." The court rules for the mother:

> "although it is a rule of international law that the succession to personal property is controlled by the law of the domicil, yet it is in the power of any State to change the law in this respect; *for unquestionably every State has a right to regulate persons and things within its own territory* according to its own sovereign will and pleasure."[56]

If these cases state the general law correctly, it is hard to avoid the conclusion that we have two rules—one saying that "the law of the situs actually governs the devolution of all property found within its borders" (at death of the owner); and another rule saying that "the law of the domicil shall govern the devolution of tangible movable property."

Though the cases so far discussed have been concerned with intestate succession, we find evidence of the same rules in a "controlling-subsumed" relation existing in every legal step ancillary to the central problem of succession. One of the earliest American cases,[57] applying the principle that the domicil governs succession, involved a will made in St. Domingo, the domicil; invalid by that law, but valid by the law of Pennsylvania, the situs of the property *and the forum.* After leaning strongly toward the position that the property should pass under the will, upon further consideration *based on policy,* the court declares that the domicil should govern.[58] The basis for its final decision was expressed thus:

> "If this is the rule in case of intestacy [that domicil governs], why should not the same rule prevail with respect to last wills?. . . . *It is only with the view to promote the general convenience and happiness of mankind that any country allows the laws of a foreign nation to operate in any instance on property within its territory.* The principle equally applies, whether the individual makes a will or not in a foreign country."[59]

Whether it is theoretically sound or not, this court clearly is operating under the influence of the principle of "comity." It would seem almost naive to assert that it had any thought of giving up legal control over the property actually within its jurisdiction. How better can this case be stated than that, "The situs has absolute ultimate legal control, but it may, by a

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[56]Jones v. Marable, 6 Humph. 116, 118 (Tenn. 1845). No doubt, Professor W. W. Cook would admit the existence of such power, but would question its significance. He would insist that any or all jurisdictions can exercise such power in case they see fit, in their own domain. The difference, though, is that this power is being recognized outside of the Arkansas domain—a recognized power, subject to a limiting discipline prescribed by general rules—and given full effect in all other jurisdictions. This fact would suggest that the significance of "rules of jurisdiction" is measured in part at least by the rules governing the "recognition of foreign judgments," found in each jurisdiction.

[57]Desesbats v. Berquier, 1 Binn. 335, 2 Am. Dec. 448 (Pa. 1808).

[58]Of course, it did not occur to courts at this time, that there might exist alternative rules at the same time, in a single legal system, validating such will *either* by the domicil, *or* the situs.

[59]1 Binn. at 338, 2 Am. Dec. at 450. Italics supplied.

choice of law rule, elect to utilize another's law for the purpose of passing title to the property in litigation."[60]

In interpreting the generally accepted conflict of laws rule that the law of the testator's domicil should be looked to in order to determine the sufficiency of the will's formalities, it soon became necessary to determine whether the "domicil" referred to was the one existing at the will's making or at the testator's death. The leading cases passing upon that question do not weaken the proposition that the situs ultimately controls the disposition of movables at death, whether by intestacy or by will—rather do they strengthen it. A Connecticut case[61] is doubly interesting in that it both passed upon this issue and also graphically illustrates the situs of the chattels modifying that common law rule by statute and utilizing the law of the place where the will was drawn to determine the sufficiency of such formalities. In 1860, one Irwin made a will in New York while domiciled there. The next year he became domiciled in Connecticut and died shortly thereafter with both real and personal property located in Connecticut. The will complied with the New York law, but not with a Connecticut statute enacted in 1848 requiring three attesting witnesses in "all wills." In considering whether the will was valid as to this formality the court observed:

> "Upon what principle or by what authority could we hold that will valid in the face of that statute if there were no other applicable to it?. . . . We must administer our local law as made, and if the property of Mr. Irwin was so *within our jurisdiction as to be subject to our law,* and the statute of 1848 is applicable to it, we must hold the will void; . . . . Was then the personal estate of Mr. Irwin subject to our laws?
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> It is conceded that the real estate of the testator situate in this state is so fixed and immovable and a part of our own territory as to be necessarily subject exclusively to our laws, and that the will would be ineffectual to pass any title to that under the general statute. *But that is also true, so far as it can by possibility be true, of his personal estate.* It is a rule of international law originated by the necessities of commercial intercourse, . . . and universally accepted by comity with all the force of domestic law, that the personal property of every man is subject to the law of his domicil . . . . Exceptions have been attempted in respect to title by testacy and the law regulating intestacy . . . . [but the] recognition in either case is of a *title* merely, the *validity* of which is determined by the domestic law, but which is recognized in obedience to a rule of international law of universal application and acceptance. . . ."[62]

There is clearly embodied in this case the thesis that the situs both of real and of personal property controls the vesting and the transfer of title

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[60]This statement of the law does not assume any particular theory as to "whose law" is in fact, applied—whether the situs "lets" foreign law apply, or makes the foreign law its law for this purpose.

[61]Irwin's Appeal, 33 Conn. 128 (1865).

[62]*Id.* at 136. Italics supplied.

to all property found within its borders but that it chooses to apply the law of the domicil at death to govern succession transfers, whether by will or intestacy. This proposition is made more distinct yet by the fact that the court found that the situs here (Connecticut) had recently modified this common law rule (which it said was based on international comity) by choosing to utilize the law of the place where the will is drawn, regardless of where the testator was domiciled at death, to determine the sufficiency of the will's formalities. It interpreted a statute enacted in 1856 as having that effect:

> ". . . . we are satisfied that it was the intention of that legislature [of 1856] to give all wills executed out of the state, according to the formalities required by the law of the place where executed, and whether of real or personal estate, the force and effect of domestic wills to pass all the property *situate in this state.*"[63]

In *Moultrie v. Hunt,*[64] the New York court had applied much the same basic principle a few years earlier. There, the will was executed in South Carolina by a domiciliary, who changed his domicil to New York shortly before his death. It conformed to the former's laws, but not the latter's. The court ruled it invalid, declaring that the same law that governed intestate succession should govern the efficacy of a will of movables —the domicil at death. It further ruled that a statute expressly providing for the proof of a will made outside of the state by one "not a citizen of New York", should be presumed to refer only to those cases where the testator was not such citizen at his death, though it assumes that its legislature was free to change that rule. Throughout the decision there is implicit the proposition that the situs of the movables simply chooses to use the law of the domicil for this purpose, and that its choice is the definitive one:

> "Although the language of our statute, to which reference has been made, includes, in its generality, all testamentary dispositions, it is, nevertheless, true, that wills, duly executed and taking effect in other States and countries according to the laws in force there, are recognized in our courts as valid acts, so far as concerns the disposition of personal property (in New York) . . . . This is according to the law of international comity. . . . *This law of comity is parcel of the municipal law of the respective countries in which it is recognized, the evidence of which, in the absence of domestic legislation or judicial decisions,* is frequently sought in the treatises of writers on international law. . . ."[65]

It is important to bear in mind that the validity of such wills almost invariably will be called in question at the situs of movables. Hence, it is not often that there is such clear recognition of the dual existence of power

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[63] *Id.* at 140. Italics supplied.
[64] 23 N.Y. 394 (1867).
[65] *Id.* at 396. Italics supplied.

recognizing rules on the one hand and of choice of law rules on the other.[66] Ordinarily the court will confine its discussion to the choice of law level. That makes it none the less likely however, that such cases actually affirm our thesis.

If it be objected that the accepted rule to the effect that both the essential validity of a will and also the question whether it has been revoked subsequently to its execution are governed by the domicil, militates against the thesis that the situs at all times has the recognized jurisdiction over the chattel, the answer is simple. At all times the situs is exercising legislative jurisdiction in all of these cases, but it happens to have selected the same choice of law to pass the property intestate as to determine the questions just named—largely because Story has persuaded most courts, in his classical work on Conflicts, of the inherent reasonableness of utilizing the domicil's law to govern all of these questions. It is interesting to note that the *Restatement* comes nearer explicitly recognizing the dual category in regard to all three of the above questions than in any other connection. Its "rationale" is almost that suggested here. Indeed nearly one hundred and twenty years ago, the United States Supreme Court declared emphatically that the situs had the sole recognized power of disposition of movables by will.[67] This case is the prototype of repeated attempts from time to time to persuade the Supreme Court to convert one of the common law choice of law rules of the situs, into a constitutional rule of controlling jurisdiction. The virility of the rule that the situs really governs in all such cases is demonstrated by the fact that the Supreme Court never has been misled, at least in the inheritance field, by arguments of counsel, as to where is vested ultimate recognized power.

Other rules of law governing incidental questions arising from the administration of an estate further support the thesis of a controlling-subordinated relationship between the situs and the domicile. The generally prevailing rule is that wills must be probated at the situs as well as at the domicil;[68] only the situs at time of death has power to appoint an administrator for slaves;[69] the domicil has no power to vest title to foreign movables in its executor so as to permit him to sue for them abroad;[70] perhaps the most significant of such decisions are those declaring that the

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[66]Professor Lorenzen discusses at great length, the exercise of asserted jurisdiction in the various types of cases herein discussed, as well as in contracts. Lorenzen, *The Validity of Wills, Deeds and Contracts As Regards Form in the Conflict of Laws* (1911) 20 YALE L. J. 427. It is not clear whether he recognizes "rules of jurisdiction" herein, or assumes that such legislation is "only directions of the local court" and nothing more.

[67]Kerr v. Devisees of Moon, 9 Wheat. 565, 6 L. ed. 161 (U.S. 1824).

[68]Armstrong v. Lear, 12 Wheat. 169, 6 L. ed. 589 (U.S. 1827).

[69]Embry v. Millar, 1 Marsh. 300 (Ky. 1818).

[70]See Doe v. McFarland, 9 Cranch 151, 152, 3 L. ed. 687 (U.S. 1815).

situs may distribute at its discretion.[71] As a final incidental indication of this recognized power, we may recall to your mind those cases already cited, both American and English, which uniformly admit power in the situs to determine whether property is "movable" or "immovable."

Of course, no one of these cases, nor any single group of them, is conclusive that our controlling rule has been operative throughout; no doubt, it has not impelled the courts in specific cases; one may succeed in putting forth a different explanation for these decisions—as, that the control the situs wields over administration simply is a prerequisite to the use of its courts—but such explanations do not really explain. True, some cases suggesting that the situs might refuse to give effect to the domiciliary law, have been inclined to state that fact in terms of "when public policy demands it"—which, in a sense, might be asserted by *any* court.[72] But effective recognized power as the basis for asserting the policy to govern these cases is quite different, for example from the premises supporting the refusal to "give effect" to contracts made abroad by domiciled married women, as has been done in several cases,[73] In the latter, the "policy" asserted will have no extra-territorial effect whatsoever (except in so far as such refusal makes unenforceable the foreign judgment), while in the "property cases," whatever "policy" is asserted by the situs, is recognized as binding in every respect abroad.

To the present the discussion has centered around succession to tangible chattels. Since there is not the compulsive factor of exclusive physical control in the case of intangibles, very different considerations may determine the basis for "recognizing legislative power" with reference to them. We have suggested that the rule "the law of the domicil governs succession to movables" conceivably may be used *either* as a "power recognizing rule" or as a "choice of law" rule. The law regulating succession of intangibles makes that statement clearer. A recent case from New Jersey,[74] with international repercussions, points up this problem.

Caruso, the famed Italian tenor, died in Italy a domiciled citizen. The subject of this suit was a contract for the benefit of himself and his

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[71]Harvey v. Richards, Fed. Cas. No. 6184, 1 Mason 381 (C.C.D. Mass. 1818); Lawrence v. Ketteridge, 21 Conn. 577 (1852); 2 BEALE, CASES ON THE CONFLICT OF LAWS (1901) 255 n. 1, citing numerous additional cases, including a few holding to the contrary.

[72]Flatauer v. Loser, 156 App. Div. 591, 141 N.Y. Supp. 951 (1st Dep't 1913); Fidelity & Deposit Co. v. Grenshaw, 120 Tenn. 606, 110 S.W. 1017 (1908); Succession of Petit, 49 La. Ann. 625, 21 So. 717 (1897). Though the Louisiana case probably erroneously refused to give effect to the normal incidents of legitimation, here, occuring abroad, it strenuously asserts the power to control absolutely title to all property in its borders. See Lee v. Belknap, 163 Ky. 418, 437, 173 S.W. 1129 (1915).

[73]Union Trust Co. v. Grosman, 245 U.S. 412, 38 S. Ct. 147, 62 L. ed. 368 (1918); *cf.* Wright v. Remington, 41 N. J. L. 48, 52, 32 Am. Rep. 180 (1879) (contract was recognized, but "power to refuse" was claimed).

[74]Caruso v. Caruso 102, N. J. Eq. 393, 141 Atl. 16 (Ch. 1928); Caruso v. Caruso, 103 N. J. Eq. 487, 143 Atl. 771 (Ch. 1928).

heirs, with the Victor Talking Machine Co., located at Camden, N. J. The question was, What law determines the distribution thereof? Without distinguishing between intangibles and chattels the court assumed that, although personal property "has no locality" it has a "situs" in New Jersey, which makes the New Jersey law controlling in this case.[75] It ostensibly recognized the generally admitted common law rule as to domicil, but further ruled that a local statute of distribution, varying in its provisions from that of Italy, established a "policy" which could not be controverted by the Italian law operating as the domicil. The Italian Court immediately issued a manifesto, declaring that it would distribute the proceeds from the contract as it saw fit, being the domicil of the deceased and beneficiaries as well, and would hold the debtor subject in Italy, to its arbitral award based on agreement between the heirs. While ignoring this manifesto the Court of Appeals of New Jersey,[76] reversed the lower court, giving full effect to the Italian decree, on the ground that New Jersey's statute of distribution did not indicate an intention by the legislature to repeal the common law rule that the domicil should govern, but applied only to those estates held, by other rules of law, to be subject directly to the New Jersey internal law.

None of the courts contested the assumption of the lower New Jersey court that the asset, represented by a contract right, had its legal situs in New Jersey. For the moment, let us hypothecate an identical case, but concerning a tangible located in New Jersey. Ordinarily, in such cases, New Jersey would have exclusive factual control over the property involved. The readiness with which the Italian court asserted its position of advantage in this particular case, shows the importance of giving legal recognition to the *fact of power,* in rules of jurisdiction, in so far as is practicable. So, in the case of a tangible, it would seem that we must admit controlling jurisdiction in the situs. However, in our actual case, no such abiding fact or power comes to our rescue. We are dealing with an intangible, a chose in action. It seems startling that neither any of the courts, nor a single one of the case notes on this case,[77] points out the extent to which this case is affected by the fact that it is dealing with an "intangible." Certainly, for many purposes, it definitely is established that the domicil of the creditor is the situs of all debts due him. So construed, Italy would be both the domicil of the deceased, and the situs of the property. Instead, the courts chose the domicil of the debtor as being the situs of the debt. The case does much to show the futility of talking about

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[75]See Note, *Law Governing Intestate Succession of Personality* (1929) 6 N. Y. U. L. Q. Rev. 456 where the conclusion by the court that the New Jersey distribution statute, expressed a "controlling policy," is severely criticised. Also refer to note 17 in this connection.

[76]Caruso v. Caruso, 106 N. J. Eq. 130, 148 Atl. 882 (1930).

[77]In addition to the Note cited *supra* n. 75, various other comments on the *Caruso* case have appeared: (1930) 78 U. of Pa. L. Rev. 781; (1929) 42 Harv. L. Rev. 827; (1929) 27 Mich. L. Rev. 808; (1930) 28 Mich. L. Rev. 1045; (1930) 14 Minn. L. Rev. 810.

"situs" of intangibles,[78] though we might very reasonably have expected the courts to discuss it, in the light of other cases. At any rate, we are faced with the problem of deciding where the law as to intangibles fits into our general thesis. Immediately, it must be stated that this is a very distinct problem from that pertaining to chattels; so we shall not attempt to investigate it exhaustively. It suffices to say that, under the influence of the Latin maxim, *mobilia sequuntur personam,* it is quite possible that the rule saying that the domicil governs succession to intangibles should be classified as a "rule of jurisdiction."[79] But how can it be a rule of jurisdiction in one case, and a choice of law rule in another? For the purposes of this study, whether it is one or the other depends entirely on how it has been used; how the courts have applied it in relation to other rules; in what manner legislatures have thought themselves bound—what has been its function in actual practice, in other words. To answer that question as to intangibles, however, is far more difficult than as to tangibles.

Here we do not have the bald fact of "exclusive physical control" upon which to append the development of a uniform rule. In fact, it may be well doubted whether there is any such uniformity of treatment of intangibles in this regard, that we can say what is the rule of jurisdiction.[80] Clearly it is much more difficult to determine the ultimate bases for judicial decisions in relation to intangibles, than it is to tangibles. The nebulousness of the subject makes it quite possible to select a decision based purely upon the judge's first impression,[81] cloak it in the form of a rule, and thus not

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[78]1 BEALE, CONFLICT OF LAWS (1935) 448; Powell, *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89.

[79]Two recent Washington State decisions well illustrate the decided influence of the recent United States Supreme Court decisions establishing an exclusive taxable situs for intangibles at the domicil: In re Lyons Estate 175 Wash. 115, 26 P.(2d) 615 (1933); In re Rowley's Estate, 178 Wash. 460, 35 P.(2d) 34 (1934). In the first case, the Washington State Supreme Court universalizes the "taxable situs" into "legal situs" for general purposes, and concludes that a bank account in Washington is not subject to its escheat laws, but is subject to Alaska's escheat laws, as the domicil of the decedent. The latter case rules that the first case is not authority for the conclusion that Washington renounces administrative supervision of all property within its confines. In both the property was a simple contract debt. In the latter, administrative situs is held to be at the domicil of the debtor, fortunately for possible local creditors of the deceased. The two decisions considered together can be explained on either of the following grounds: (1) for one purpose, the situs of an intangible may be deemed to be at the creditor's dimicil; for another purpose, at the debtor's domicil; (2) in both cases the legislative situs is in Washington. In the first case, Washington "chooses" to give effect to a domiciliary interest. In the second case it chooses to assert its admitted administrative interest. Which "rationalization" is preferable? Compare Justice Stone's decision in Curry v. McCanless, 307 U.S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339, 123 A.L.R. 162 (1939).

[80]Although originally written three years before Curry v. McCanless, 307 U.S. 357, 59 Sup. Ct. 900, 83 L. ed. 1339, 123 A.L.R. 162 (1939), was decided, this statement seems to be precisely the grounds upon which Justice Stone refused to extend the constitutional doctrine of exclusive taxing power to intangibles. See note 42, *supra.*

[81]The course of conflicts decisions in New York State exemplifies this statement: CHEATHAM, RESTATEMENT OF THE CONFLICT OF LAWS, NEW YORK ANNOTATIONS (1935) 216-17. Five inconsistent methods of resolving the conflicts problem in the law of contracts, are listed as commonly practiced in the New York Courts.

be open to the accusation of "deliberate circumvention of the law."[82] No doubt, many courts have done this without being conscious of it. Since, ordinarily, the only question to be asked is "Whose law shall be deemed to govern?", and the answer to that being, "The domicil", it would seem that we must call it a "rule of jurisdiction." This conclusion does not preclude the development of a "choice of law rule" by the domicil, with a concurrent recognition of the rule as such, by other jurisdictions, but such development has not yet taken place, as regards "intangibles." Also, with the aid of the rationalization that personal property follows its owner, we could successfully apply our chart given *infra,* to intangibles, but that would be of no value to us in understanding the law, and would be simply making it appear to conform to the logical implications of "controlling principles" which may not, in fact, control.

Other modern expressions of the recognized exclusive legislative power of the situs, over the succession of chattels manifest themselves in a multitude of ways. Some of them may be considered, in an enumerated order: (1) statutory declarations of such power, uniformly deemed to be merely declaratory of the common law; (2) the relations of this assertion of power to the "taxing power", as expounded in decisions; (3) the assumption by some jurisdictions that power inheres in the situs to control absolutely and to deny any rights asserted by third parties and arising under "wrongful death statutes" of foreign states.

We find Mississippi and Illinois[83] categorically stipulating by statute that *all* property therein located shall devolve according to their own laws only. Both of these statutes have been judicially interpreted and given unlimited effect in abrogating the common law rule as to the domicil.[84] In *Headen v. Cohn,* the court stated: "The legislature of Illinois has the same power to provide for the descent and heirship of personal property in this state that it has to control the heirship and descent of land in this state."[85] The really significant thing about these statutes, however, is not that their own courts give effect to them, but rather that all other common law jurisdictions recognize full jurisdiction to so alter the common law by statute. By statute California defers to the situs in equally certain terms: "If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by

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[82]This statement is not to be taken as setting off "policy" in contrast to "law," nor is it a criticism of the position that "policy" and "law" ultimately, are one and the same. Perhaps such position is necessary for any law giving effect to an intelligent evaluation of interests. But one may question the 'healthiness" of law merely expressing the feelings of the judge, and given the form of a rule.

[83]MISS. CODE ANN. (1930) § 1401; ILL. STAT. ANN. (Smith-Hurd, 1935) c. 39, § 1. Both statutes are limited to intestacy—the former by judicial construction in Slaughter v. Garland, 40 Miss. 172 (1866); the latter by express statement.

[84]Headen v. Cohn, 292 Ill. 210, 126 N.E. 550 (1920); Partee v. Kortrecht, 52 Miss. 66 (1876); Carrol v. McPike, 53 Miss. 569 (1876); *Cf.* Richardson v. Neblett, 122 Miss. 723, 84 So. 695 (1920); 2 BEALE, CONFLICT OF LAWS (1935) 1032.

[85]292 Ill. 210, 126 N.E. 550, 552 (1920).

the law of his domicil".[86] (The extent to which this statute is given *general* application in practice, need not be considered here.) Oklahoma, Montana, and North Dakota,[87] among others, adopt the same rule verbatim.

Another topic that lends confusion to the law regulating succession is that of taxation. Quite frequently, in the past, both the domicil and the situs have levied transfer or inheritance taxes upon the succession to property. Correctly perceived, it is thought that decisions regarding the power to impose inheritance taxes bear no relation to the question of whose law governs the actual devolution. Unlike other fields, there has been little or no effort, in the common law, to develop an "exclusive jurisdiction to tax," because of the historical conceptions of the sovereign power to tax in almost any manner susceptible of enforcement. No one sovereign would think of questioning the "right" of another sovereign to tax, as long as there was the least basis in relationship between that sovereign and the taxed subject. That is, each sovereign determines whether his relationship to the thing or the person is such as to support the imposition of a tax. Where that relationship is divided in fealty, it is but natural that several sovereigns assert taxing power. The fact that there has been no cooperation whatsoever between sovereigns in the enforcement of taxing statutes, is significant evidence of the very great difference in the development of this law from that of other fields of conflicts.[88] While possibly, not actually beyond the "pale of the law," barring constitutional limitations on that power, taxing powers at least are "on the verge of the law," in the sense of uniform legal restraint or regulation.[89] Surely this is

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[86] CAL. CIV. CODE (Deering, 1937) § 946.

[87] MONT. REV. CODE (1936) § 6803; OKLA. COMP. STAT. (1922) § 8544; N. D. COMP. LAWS (1913) § 5444. The California Supreme Court has construed its statute so as absolutely to control personal property *within* California, declaring void a will making large bequests to charities, valid at the domicil, New York, but void under CAL. CIV. CODE (Deering, 1937) § 1285, limiting the size of charitable bequests. In re Lathrop's Estate, 165 Cal. 243, 131 Pac. 752 (1913). This decision makes the code provision quite as emphatic an assertion of power as either the Illinois or Mississippi statute.

[88] *Cf.* Newborg, *Concept of Sovereignty and Conflict of Laws,* in CHEATHAM, DOWLING & GOODRICH, CASES AND MATERIALS ON CONFLICT OF LAWS (1936) 296. Newborg decries the extent to which "sovereignty is but the cloak of power. The real question is always, should the power be exercised?" Might it not be better to attach the classical conceptions of "sovereignty"? Whatever those conceptions are, it would seem inevitable that they form the cornerstones for a system of Conflicts if we give legal form to all uniformly controlling facts. Newborg gives little or no effect to the concept "recognized power," in which case it is *declared* that the power should be exercised. But here he speaks, not of a "power" manifested within a "community of precepts," but rather of a sovereign acting with no particular thought of the benefices of uniformity of action—on the assuption that, in each and every case, the sovereign must ask himself whether he should assert an unrestrained power. While doubtlessly accurate for some purposes, does such position give us the real spirit of common law conflicts? This largely conforms to the "unique theory" of law, expressed legislatively.

[89] *Cf.* Burnet v. Brooks, 288 U.S. 378, 53 Sup. Ct. 457, 77 L. ed. 844 (1933); and Guaranty Trust Co. of New York v. Com. of Int. Rev. 79 F.(2d) 245 (C.C.A. 2d 1935); with Frick v. Penn, 268 U.S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058 (1925); and City Bank Farmers Trust Co. v. Schander, etc. 293 U.S. 112, 55 Sup. Ct. 29, 79 L. ed. 228 (1934).

enough to establish a vital difference between any decisions bearing upon taxation, and other cases involving strictly individual interests in given property.

Hence it is all the more significant that courts often have assumed that the resolution of inheritance taxing jurisdiction was determined by the rule as to what law governed succession. The results of such assumptions are shown in a Louisiana case[90] in which the court refused to interpret one of its own revenue statutes, palpably taxing the inheritance from foreign owners of local movables, because it said that the legislature could not be deemed to have intended such a result—assuming that "such a result" would necessarily be the revoking of Louisiana's common law rule that the domicil governed the succession to movables. Mississippi, the domicil, had presumed to tax any and all parts of the inheritance from its domiciliaries. More recently, another Louisiana case[91] overrules the one just discussed, deciding that, even though the law of Mississippi, the domicil, *is* used to determine inheritance, that does not bar Louisiana's sovereign power to tax any property within its boundaries. The court did not seem quite satisfied with a conclusion envisaging the double taxation, but if it had been clear in its own mind that whatever Mississippi law was being used, was at the direction of the Louisiana sovereign, it clearly would have felt no hesitancy in recognizing the validity of its own taxing statute, and would have declared that the domicil's tax law was the one to give way.

An earlier decision[92] of a sister state declares in no uncertain terms the power of Tennessee to tax any and all properties within its borders, including an inheritance on a Kentuckian's movables. It throws in for good measure, a dictim worded in very strong language, to the effect that a state has plenary power to determine the devolution of property within its borders; it can change the common law rule if and whenever it wishes, as well as alter the nature of the property, legally. It is more significant yet, however, because it immediately recognizes that taxing power, and the determination of what law governs the succession are absolutely independent problems, and that an assertion to tax in no way raises in question the common law conflicts rule governing succession. In this particular case, it concluded that its legislature intended that the property of foreign residents should be included under the pertinent local taxing provisions, which however excepted inheritance taken by enumerated close relatives. After first deciding that Tennessee continued to refer to the law of the domicil to determine inheritance, it then determined that the mother would take thereunder, and so, was exempted under the Tennessee statute, exempting such close relative.

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[90]Succession of Harrow, 140 La. 470, 73 So. 683, L.R.A. 1917D, 281 (1916).
[91]Succession of Popp, 164 La. 464, 83 So. 765 (1919).
[92]Fidelity & Deposit Co. v. Grenshaw, 120 Tenn. 606, 110 S.W. 1017 (1908).

Under a leading case[93] the New York law early became established that it could impose a transfer tax upon foreign movables belonging to its domiciliaries. The entire court agreed that the legislature had improperly attempted to extend the statute to foreign land, however. In a strong dissent as to the statute's constitutionality when applied to movables, Judge Grey insisted[94] that the New York legislature had no more authority to tax foreign movables than it did foreign land. He said that it was utterly devoid of such power, refusing to recognize the validity of a view looking to a "right of succession" as the subject of the tax, rather than the property itself.[95] Clearly, the basis of the majority for supporting the tax on personal property, could just as well be applied to land—the alleged subject of the tax was not affected by the nature of the property. It is not clear whether the ancient maxim, *mobilia personam sequuntur,* influenced the court to any extent. It is very likely though, that the primary consideration in their minds was the fact that the "New York" law was utilized to devolve the property, though they talked of the *"right* to inherit" only, being taxed. While such basis for taxing may be held sufficient as between the state of New York and one of its own citizens, the case is not at all determinative of which soverign ultimately governs succession; in fact, that question cannot be determined until it arises between the two sovereigns themselves, which at common law, would be impossible in taxation, because no sovereign had ever claimed the *exclusive* right to tax in such case. Indeed under the thesis that it really is the situs that makes the transfer, but that it chooses to utilize the domicil's law for this case, then even the *right* is created by the situs rather than the domicil—it is the situs' law clear through.

For the issue to be set between two sovereign states, it had to be done under a mutually delimiting instrumentality, as a constitution. This occurred in the *Frick* case[96] coming up from Pennsylvania, which had asserted exactly the same power to impose an inheritance tax upon all movables of a domiciliary. The power was challenged as to movables in New York and Massachusetts. The Supreme Court assumed that such taxation *necessarily* is a tax upon the property itself, though we already have seen that this is not the case, historically. Further it refused to recognize the fact that there may be more than one basis for taxing a subject, under the Constitution, evolving a constitutional single tax doctrine in favor of the situs. While the Court might have permitted either or both

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[93]*In re* Estate of Swift, 137 N.Y. 77, 32 N.E. 1096 (1893).

[94]32 N.E. at 1097 *et seq.*

[95]In Gray's dissent, we have the problem of deciding whether the basis of his opinion as to "inherent limitation" of the legislature, is in any degree predicated upon "conflicts principles." It might reasonably be argued that the former is quite independent of the latter. The same question arises in numerous United States Supreme Court decisions, noted *infra.*

[96]Frick v. Pennsylvania, 268 U.S. 483, 45 Sup. Ct. 603, 69 L. ed. 1058 (1925).

jurisdictions to tax here,[97] without placing in doubt our principal thesis, because of the peculiar position the taxing power holds in the common law, the fact that it selected the "situs" of the property and the reasons that it gave for that selection when it decided to make the taxing power exclusive under the Constitution, strongly indicates the factors present in the law controlling succession generally. The Court states the basis for its decision thus:

> "Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the State of its situs, and that the laws of other States have no bearing save as that State expressly or tacitly adopts them—their bearing then being attributable to such adoption and not to any force of their own."[98]

Exactly the same thesis, put equally pithily is repeated in *City Bank Farmers' Trust Company v. Schnader,*[99] several years later, the Court stating that, "New York laws [the domicil] had no bearing other than that attributable to their implied adoption by Pennsylvania [the actual situs]." It is submitted that recognition of the general power of the situs here is in no manner a "constitutional principle," but is purely common law, and that the only "constitutional rule" imposed was in making the *taxing* power *exclusive* in such case.[100]

It must be borne in mind that no case which does not include a clear cut contest between the "situs" and "domicil", as to which shall control ultimately, is decisive of our thesis. The only common law tax case at hand which might be held to treat the "domicil" as actually controlling is that of

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[97]Bullen v. Wisconsin, 240 U.S. 625, 36 Sup. Ct. 473 (1916), demonstrates this fact. Here, the domicil is allowed to impose an inheritance tax upon foreign property, but the decision in no way implies a controlling jurisdiction over the goods in the domicil. Indeed, this is negatived by Holmes' statement that, "it may be said that in a practical sense, at least, the law of the domicil is needed to establish the inheritance." See comments on Gray's dissent in *In re* Swift's Estate, *supra* p. 101. Holmes' observation to the effect that an intestate succession at common law is recognized as a "universitas," must be taken with caution, in that the dissimilarities between the two are much greater than the similarities. *Cf.* BAR, PRIVATE INTERNATIONAL LAW (Gillespie's tr. 1892) 792-98. In this case, the Supreme Court simply was not yet ready to assimilate and limit the taxing power, unrestrained at common law, by a rule of jurisdiction which has uniformly been operative in other portions of the law. They took that step shortly afterward in the Frick case.

[98]Frick v. Pennsylvania, 268 U.S. at 491, 45 Sup. Ct. at 605, 69 L. ed. at 1063.

[99]293 U.S. 112, 55 Sup. Ct. 29, 79 L. ed. 228 (1934).

[100]*Cf.* De Sloovere, *On Looking Into Mr. Beale's Conflict of Laws* (1936) 13 N. Y. U. L. Q. REV. 333, 349. Professor De Sloovere assumed the heresy of the Frick case, as rationalized by the Court itself, saying that to recognize that the situs really passed titles to movables, even though the domiciliary law is used, seems to support the "incorporation" theory. Under the "controlling-subsumed" conception of the nature of conflicts rules, however, the vested rights theory may be justified by the "rule of jurisdiction" of the forum, with the "incorporation" principle (not *a la* Cook), explaining the process of the "choice of law rule." It may be doubted, however, whether De Sloovere uses the term "incorporation" as professor Cook would have used it. Cook, *The Logical and Legal Basis of the Conflict of Laws* (1924) 33 YALE L. J. 457, 469.

In re *Swift*,[101] but since that dealt with taxation, and in no way brought into focus the relative rights of New York as the domicil, against the situs, even it is of little significance. Moreover, other New York cases clearly recognize the ultimate power of the situs. On the other hand, it would be very hard to conceive of a case more categorically setting forth the underlying tenets of a "controlling-subsumed" relationship between the conflicts rules involved, without formally calling it that than do the *Frick* and the *Schnader* cases.

Another manifestation of this "inherent power of the situs" is found in still a different form, in cases dealing with the extent to which a foreign created right under a wrongful death statute, will be given effect at the domicil of the deceased, which usually is also the situs of the property. The New York cases[102] are particularly pertinent in this respect. Of this group, at least three[103] definitely rely in part on the fact of their control over the property, in refusing to give effect to such foreign rights. Even though such reliance was not necessary,[104] these cases clearly indicate the temper of the court in regard to whose law governs every phase of the transfer of property from a deceased—or bankrupt—to heirs or creditors. In re *Killough*[105] states, "The right to take property by devise or descent is a creature of positive law and not natural right. . . The manner and terms of devolution are within the sole and absolute regulation of sovereignty within whose jurisdiction the property involved is located."[106] *Clough v. Gardiner*[107] bases its decision in part upon the interesting conclusion that, "Neither under our statutes nor our decided cases can the estate of the wrongdoer, in such a case as the one at bar, be depleted to the detriment

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[101]137 N.Y. 77, 32 N.E. 1096 (1893).

[102]Those refusing to recognize such foreign created right: Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934), *rev'g* 240 App. Div. 881, 267 N.Y. Supp. 968 (1st Dep't 1933); Clough v. Gardiner, 111 Misc. 244, 182 N.Y. Supp. 803 (Sup. Ct. 1920), *aff'd mem.* 194 App. Div. 923, 184 N.Y. Supp. 914 (2d Dep't 1920); In re Killough, 148 Misc. 73, 265 N.Y. Supp. 301 (Surr. Ct. 1933), rev'd on other ground, 245 App. Div. 744, 280 N.Y. Supp. 234 (2d Dep't 1935). *Contra:* Domres v. Storm, 236 App. Div. 630, 260 N.Y. Supp. 335 (4th Dep't 1935); Taynton v. Volmer, 151 Misc. 214, 271 N.Y. Supp. 128 (Sup. Ct. 1934).

[103]Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934); Clough v. Gardiner, 11 Misc. 244, 182 N.Y. Supp. 803, 807 (Sup. Ct. 1920); In re Killough, 148 Misc. 73, 265 N.Y. Supp. 301, 316-17 (Surr. Ct. 1933). See Crouch's dissent in Mertz v. Mertz, 271 N.Y. 466, 3 N.E.(2d) 597 (1936), interpreting Herzog v. Stern, *supra.*

[104]The most sensible basis for refusing to give effect to the foreign statute, by New York, was indicated in Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934), to the effect that it could not permit another jurisdiction arbitrarily to alter the respective rights and duties of administrators appointed by the New York Courts. However, the courts of other jurisdictions had had no difficulty in giving such effect to foreign wrongful death statutes: Chubbuck v. Holloway 182 Minn. 255, 234 N.W. 314, 868 (1931); Kertson v. Johnson 185 Minn. 591, 242 N.W. 329 (1932), 85 A.L.R. 1; Burg v. Knox, 334 M. 329, 67 S.W.(2d) 96 (1933).

[105]148 Misc. 244, 265 N.Y. Supp. 301 (Surr. Ct. 1933) rev'd on other ground, 245 App. Div. 744, 280 N.Y. Supp. 234 (2d Dept. 1935).

[106]*Id.* at—, 265 N.Y. Supp., 316.

[107]Clough v. Gardiner, 111 Misc. 244, 182 N.Y. Supp. 803 (Sup. Ct. 1920) *aff'd mem.* 194 App. Div. 923, 184 N.Y. Supp. 914 (2d Dept. 1920).

of his heirs at law, next of kin, and creditors."[108] In commenting upon the power of Virginia to affect rights in property elsewhere, *Herzog v. Stern*[109] contributes this, "Each state [Virginia], may define rights and obligations of persons coming within its territorial bounds, but no state may have power to provide that such rights and obligations may be enforced out of property of deceased wrongdoer in possession of executors or administrators appointed by courts of another state in which wrongdoer was resident.[110] Though domicil and situs were co-terminous in these cases, the fact of "situs" seemed to be dominant in the opinions. Although these cases are not conclusive as between the power of the situs and of the domicil, because it was not a law of the domicil of the owner which professed to give the right involved, New York unhesitatingly asserts ultimate jurisdiction over the property involved, as the situs of that property. apparently.[111]

With this very selective examination of the cases involving our subject, it is hoped that the reader agrees that there has in fact, been a rule in the common law from the first moment of formal adjudication, either implicitly or explicitly expressed, recognizing absolute control in the situs of all tangible property, to determine its devolution. If, however, its status in the earlier period is too shadowy, uncertain, and conflicting for you to go that length, surely it is clear that the controlling rule as to the situs and the choice of law rule as to the domicil, have existed side by side,[112] in a "controlling-subsumed" relation, for some 100 to 125 years. By the very process of emphasizing the historical and philosophical aspects of the common law, we have, in the same measure established that the power recog-

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[108] *Id.* at—, 182 N.Y. Supp. 897.

[109] 264 N.Y. 279 N.E. 23 (1934).

[110] *Id.* at—, 191 N.E. 24.

[111] Two additional cases throwing some light on this subject involving property interests arising from the "chose in action" given by a foreign wrongful death statute are Hartman v. Duke, 160 Tenn. 134, 22 S.W.(2d) 221 (1929); and Pennsylvania R. Co. v. Levine, 262 Fed. 557 (C.C.A. 2d, 1920).

In answer to the contention that the place of the tort could not stipulate who the beneficiary of the resulting right should be, the Tennessee case says, "although as a rule succession of personal property is controlled by law of intestate's domicile, it does not lie beyond power of state to change that law, and every state may control the devolution of property and property rights within its borders, especially where the right is creature of its own law." 22 S.W.(2d) at 221. On the same subject, the Federal court in Pennsylvania declares that the Pennsylvania statute governs exclusively who shall take under its wrongful death statute. Since its succession law also expressly states that nothing in it shall apply to a foreign domiciliary, the common law rule that the domicile shall govern, continues to apply, and the right of action under the wrongful death statute devolves according to the domicile of the deceased. Although both of these cases deal with intangibles, and even though the "property" is a "chose in action" created by a particular state, they are further evidence of the general attitude of the courts in regard to succession to movables. The same frame of mind recognizing jurisdiction where the tort arose, and the right was created, surely would admit ultimate jurisdiction in the situs of tangibles.

[112] It must be remembered, however, that the only applicable choice of law in any particular case is that at the situs—only there will be found a choice of law rule for this particular case subordinate or subsumed to the rule of controlling jurisdiction.

nizing rule is more than merely a part of the *source* of the law of particular jurisdictions. Neither can it be said to be a mere inarticulate assumption of the judge.[113] Repeatedly have the courtts pulled that rule down from its omnipresent home in the sky and incorporated it into the particular law by enunciating in no uncertain terms that they themselves, were absolutely bound by it.

Both the existence of our "controlling-subsumed" relationship and its dynamic possibilities may be visualized more clearly by its expression in graphic form, as follows:

Tennessee (Domicil & forum)	Louisiana (Situs)	T. (3rd. State)
RULE OF JURISDICTION Situs governs all tangibles	RULE OF JURISDICTION Situs governs all tangibles	RULE OF JURISDICTION Situs governs all tangibles
CHOICE OF LAW RULE (None for *this* case)	CHOICE OF LAW RULE Domicil devolves (but situs defines) movables	CHOICE OF LAW RULE (None for *this* case)
INTERNAL LAW	INTERNAL LAW	INTERNAL LAW

This is a graphic representation of the problem involved in *McCollum v. Smith,*[114] in which the Tennessee Court recognized sole power in Louisiana to determine whether a slave was a movable or an immovable, for the purpose of determining which law transmitted the title by inheritance. The third state is included in the graph only to make it formally complete. Louisiana law *might* refer to a third state rather than back to the domicil and forum.

Earlier in this paper it was recognized that some persons, familiar with existing suggestions that it really was the law of the situs that devolved intestate movables, might be inclined to say that this study merely repeats in very elongated form what has been said elsewhere in a brief statement or two. The answer is that those most trenchantly expounding that view have not developed the fact that such explanation involves a radical departure from the generally accepted description of the judicial procedure in a conflicts situation. Nowhere is it suggested that there really are two fundamentally different types of conflict of laws rules serving basically different purposes in each legal system. Nowhere does there appear the realization that such an anomalous explanation requires both a very critical appraisal of it, applied to the succession field, and a careful reexamination of the entire Conflict of Laws field, to determine to what extent such dual category of Conflict of Laws rules may be found to exist

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[113]Superficially considered, the fact that this rule of controlling jurisdiction has been given such little consideration and generally never thought of as a conflict of laws rule that must be correlated with other pertinent rules, appears to be a strange anomaly in the law. The most plausible explanation is too involved to present here. But surely such state of the law cries out for a more thoroughgoing inquiry into the question of just what is a conflict of laws rule.

[114]McCollum v. Smith, Meigs 342 (Tenn. 1845).

in other fields.[115] The latter study must be presented elsewhere. But some of the consequences implicit in fully recognizing the dual category of Conflict of Laws rules in the succession field alone, may be pointed out in concluding this study.

Though Abbott's study,[116] repudiating *renvoi* is the most powerful exposition to date of the proposition that the *situs* devolves intestate movables by resort to the domicil's internal law, he fails fully to realize the relation between the power recognizing rule and the choice of law rule. He declares that,

> "Any country may divide possible testators into groups, and prescribe a different form of will for each group. . . An Englishman might equally be permitted to make his will as prescribed by the English Wills Act, while Frenchmen were allowed their own national form. Or a distinctive form might be prescribed for Caucasians as distinguished from Malays, Mongolians, or Negroes. Clearly these would be but instances of a highly specialized Wills Act, *which is part of the internal, not of the private international law of the country in question.* . . [117]

In this statement Abbott fails to give to the phrase "choice of law" that meaning required by his major thesis. Actually with the recognized power we may find the process of choosing the applicable interest creating rule, according to different foreign contacts right in the internal legislation of the state having the recognized power. He did not fully discern the bearing that the exercise of legislative power has to a conflict of laws problem—though strongly suggested by his principal thesis. In similar vein both Beale[118] and Cheshire[119] inform us that the rule that the domicile shall govern the intestate succession of movables is not a conflict of laws rule at all, but really a part of the internal law.[120]

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[115]*Cf.* 2 BEALE, CONFLICT OF LAWS (1935) 1080. Though Beale puts more emphasis on it elsewhere, the casual recognition that the situs applies the domicil's law given here appears to be a mere rationalization. In the face of an explicit recognition of the dual category of conflict of laws rules in a nineteenth century contracts case, Professor Beale observes, "By this ingenious but complex theory the law of the place of contracting governs; but that law is that contracts may be made either in accordance with the local provisions, or if the parties so choose in accordance with the laws of the state of performance. This theory gives the parties an option, but only as between the laws of two places." *Id.* at 1106; Andrews v. Pond, 13 Pet 61, 10 L. ed. 65. (1839).

[116]Abbott, *Is the Renvoi a Part of the Common Law?* (1908) LA. L. Q. REV. 133.

[117]*Id.* at 143.

[118]1 BEALE, CONFLICT OF LAWS (1935) 58.

[119]CHESHIRE, PRIVATE INTERNATIONAL LAW (2d ed. 1938) 53. See Professor Griswold's discussion of this point in his *Renvoi Revisited* (1938) 51 HARV. L. REV. 1165, 1198.

[120]On the general subject of what should *not* be deemed to constitute a conflict of laws rule, see also Falconbridge, *Renvoi and the Law of the Domicile* (1941) 19 CAN. BAR REV. 311, 318-19. He tells us that where a given law is exclusively "personal" in character "that is, it has not a system of domestic rules applicable normally to all cases which contain no foreign element in addition to a system of conflict rules for cases which contain a foreign element or foreign elements" it has no "conflict of

Likewise, both Goodrich[121] and the Restatement[122] of Laws make the suggestion that it really is the law of the situs that applies the domicil's succession rule, as though, having advanced that "rationale" there was nothing more to say. So it is not surprising to find both courts and other writers passing up this "explanation" almost without notice, almost as though it were not even a very significant "rationalization".

Actually, it makes a very real difference indeed, in evaluating a case as authority for the future, whether it be deemed to stand for the proposition that the forum feels perfectly free to select *either* the law of the domicil of the deceased or of any other law it may choose, at its discretion, on the one hand, or instead, to support the other proposition that the forum considers it either necessary or desirable[123] to look only to whatever law the legislative policy of the situs should dictate. And this difference is not just a formal or doctrinal one.[124] If the case stands for the former proposition, legislative changes in the common law rule at the situs will be irrelevant in another forum; if it stands for the latter proposition, such changes will absolutely control the forum, wherever it be. Surely there is every practical reason for carefully distinguishing between a rule looking *to* the situs for the purpose of giving effect to whatever "choice of law" it may make, and the rule found at the situs making that "choice of law".

It is only necessary to recall the Louisiana case, *Succession of Harrow*,[125] to observe what grievous results may come from incorrectly appraising the nature of the rule that the domicil "governs" intestate succession. It ruled that an inheritance tax by the situs (also the forum) was

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laws" distinct from its "domestic laws", and that hence, a reference to that law necessarily is to its domestic law, even though the latter may take the form of incorporating the law of still another country. Without elaborating, it seems proper to query here: If rules be classified "domestic" or "conflict" according to their *function* instead of their formal expression, will not every legal system *necessarily* include both kinds of rules? See also Abbott, *Is the Renvoi a Part of the Common Law?* (1908) 24 L. Q. Rev. 133, 143 *supra*.

[121]Goodrich, Conflict of Laws (2d ed. 1938) § 161.

[122]Restatement, Conflict of Laws § 603, Comment a.

[123]The factors causing the forum to recognize a legislative power vary according to the nature of the case. Though there practically always is a strongly persuasive element present, it may range from the compulsive fact of exclusive power over land, to the inducing factor of great desire for agreement among all jurisdictions as to whether two parties are divorced, which led Justice Cardozo to look to the law of the matrimonial domicil, including its choice of law rule if pertinent, to determine that question. Dean v. Dean, 241 N.Y. 240, 149 N.E. 844 (1925). But even here, this desire for agreement in all states operates compulsively on the forum, in a very important sense.

[124]Abbott expresses this basic difference thus: ". . . as we have seen, the *renvoi* if carried to its logical conclusion produces a deadlock between the law of the situs and the law of the domicil. Equality of force, however, is requisite for a deadlock. The full-blown *renvoi*, therefore, must be based on a supposed equality between the law of the domicil and the law of the situs. But clearly if the law of the domicil yields to the public policy of the situs it cannot be equal thereto. These cases establish the supremacy of the law of the situs. . ." Abbott, *Is the Renvoi a Part of the Common Law?* (1908) 24 L. Q. Rev. 133, 141.

[125]140 La. 470, 73 So. 683 (1916).

wholly incompatible with the rule that the domicil governed the transfer, simply because it conceived of the domicil as *controlling* that transfer. Not until the Louisiana Court came dimly to realize at least, that it was really Louisiana's law at all times that transferred title to an intestate's local movables, did it give proper effect to Louisiana's taxing laws.

Another illustration of the value of determining whether it really has always been the common law rule that it is the situs that transfers the title in such case, is found in Professor De Sloovere's analysis of the assertion of that rule in the *Frick* case.[126] Though recognizing something of the profounder implications of such proposition, he seems to consider it as something altogether new in the law—almost a heretical utterance under the common law. Is any other conclusion possible than that the situs always has governed if the materials discussed in this study reflect the common law?

In similar vein is the plaint in a casenote commenting on the conclusion of the Wisconsin Court that the situs of movables controls the validity of a purported testamentary trust of those movables. Though it notices the rationale that the situs really governs intestate succession, suggested by *Frick v. Pennsylvania,*[127] apparently it considers that an innovation. It assumes that the "law" of Wisconsin as to the validity of a trust of movables located there, should be ascertainable simply by determining what rule other state courts frequently have applied: "It would seem, from a review of the cases, that the law which should determine the validity of the trust in question is that of the domicile of the testator, regardless of the situs of the property."[128] Not once does this comment consider the problem at the "power recognizing" or "rule of controlling jurisdiction" level. But perhaps the most striking demonstration yet of the need for consistently recognizing the existence of two fundamentally different types of conflict of laws, is found in Professor Lorenzen's assumption that he completely refutes Story's basic maxims merely by pointing out that the domiciliary law has quite generally been referred to since long before Story's time, to devolve an intestate's movables.[129]

The inadequate analysis of the law of intestate succession demonstrated by the above examples may be explained in part by the unfortunate assumption that there is a basic difference between the rules of law ordinarily utilized by a given legal system to enforce legal interests and its "public policy" on special occasions. Even yet, many writers speak as though when "public policy" comes in the front door, "law" flies out the window. So we find more than one writer glibly declaring that the law of the domicil universally governs—and then grudgingly admitting that such

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[126]See De Sloovere, *On Looking into Mr. Beale's Conflict of Laws* (1936) 13 N. Y. U. L. Q. Rev. 333, 349.

[127]268 U. S. 483, 45 Sup. Ct. 603, 69 L. ed. 1058 (1925).

[128]Note (1928) 26 Mich. L. Rev. 694, 695.

[129]See discussion, *supra* notes 2 *et seq.* and corresponding text.

rule is not operative if contrary to the "public policy" of the situs.[130] Quite generally, they treat this "interference" by the situs as an arbitrary suspension of the "law." But recognizing the basic identity of "public policy" and "the law," of itself, is not enough.

To illustrate: In recent years there has been developed a very salutary suggestion that in solving a conflict of laws problem, all of the foreign contracts should be carefully considered to the end that that law be selected giving the most satisfactory results to the forum. That is, instead of assuming that the law selected is pre-determined by the irresistible logics of "sovereignty," or by what one authority calls "formal casuistry,"[131] it now is thought that the forum may "pick and choose" the most significant contact in the light of any one of various policy criteria existing in its law. So far, so good. But note that it almost invariably is assumed that the *forum* should consider itself as free as the wind to do this "picking and choosing." It is right at this point that the modern approach may be most seriously questioned. At least in the succession field it fails to give us a full account of the controlling premises actually contained in the cases. Here the common law courts do not consider themselves *free* to pick and choose. While some such courts may be governed by "formal casuistry," the conclusion that they are not free to make the choice can be just as readily supported by the finding of a controlling policy in the forum's law dictating that it "recognize a legislative power" instead of choosing directly the interest creating rule regulating this question. And this controlling policy may be concerned only with the ultimate result thus achieved. The only "free choice" as to how an intestate's movables shall devolve is made by the situs, and it alone. The only conflicts rule applied by the forum from its own law is its power recognizing rule (rule of controlling jurisdiction). It has absolutely no "choice of law" available for this particular case. So we find two policies, from different jurisdictions, operating at different levels, contributing to the solution of the case. The forum's dominant policy is that it shall submit to the policy of the situs as to what law shall apply. Yet, in seeking to be realistic, all current writers, without exception, examine the various policy criteria that may or should determine the case strictly at the "choice of law" level, at the same time that they assume that any one of these criteria is equally available to the forum in each case.

However salutary may be the recognition of such criteria as "justice" in the particular case, or "uniformity," or "predictability," or "convenience of admistration" or any end based upon dominant social interest or what have you, in the succession field at least, the only legal system

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[130]A striking example of how the controlling policy of the situs is treated as an interposing exception to the generally recognized law is found in DICEY, THE CONFLICT OF LAWS (4th ed.) Rule 154 at p. 585 with exception at 589. Dicey consistently recognizes the significance of the situs only in terms of "choice of law." *Id.* Rules 149 *et seq.*

[131]Yntema in FOREWORD to HANCOCK, TORTS IN THE CONFLICT OF LAWS (1942) ix.

recognized to be in a position to give due effect criteria is the situs, which, conceivably, may never state its law on the subject through its courts, but rather only through its statutes. The inadequacy of assuming that it is simply a case of "choice of law" by the forum is well revealed by a recent study of the law of trusts in the conflicts field—a very able monograph.[132]

That work lists eight criteria influencing the New York courts at different times in determining what law governs the essential validity of an *inter vivos* trust of intangibles.[133] The "location of the trust property" is included along with all the others being discussed at the choice of law level, apparently, it being assumed that one or the other of these contacts necessarily indicates what *internal* or interest creating rule should be appplied by the forum. Until 1933 the rule had been, in New York, that the domicil of the settlor determined the essential validity of an *inter vivos* trust of intangibles. In that year *Hutchison v. Ross*[134] is supposed to have changed that rule, in favor of the situs. It considered the validity of an *inter vivos* trust, created in Quebec, of securities located in New York. By the former's law the trust was invalid; by New York's law it was good. In sustaining the trust, the court had this to say:

> "Such documents and the personal property merged or embodied in them have, like tangible chattels, a situs apart from the domicile of the owners. . . The physical presence of such documents gives the State jurisdiction over them in other respects [than for tax purposes] . . . It follows that the validity of a trust of personal property must be determined by the law of this State, when the property is situated here and the parties intended that it should be administered here in accordance with the laws of this State."[135]

The author interpreted the case thus:

> "Because of Hutchison v. Ross, the importance of the settlor's domicil has declined until now this element will probably be considered of about the same importance as the domicil of the trustee. On the other hand this decision points out not only that the location of the trust property is of particular importance in determining the governing law, but also that the express or implied intent of the parties as to the governing law is entitled to special consideration by the courts."[136]

This discussion of the case appears to put all contacts on exactly the same plane with the New York court simply as the forum, considering first one contact and then another as the most significant one. The problem is complicated somewhat by the fact that a rule saying that the situs

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[132]LAND, TRUSTS IN THE CONFLICT OF LAWS (1940).
[133]*Id.* § 21.
[134]262 N.Y. 381, 187 N.E. 65 (1933).
[135]187 N.E. at 69. Note that the Court refuses to be influenced, even by the U. S. Supreme Court's constitutional limitation on the power to tax. See also Curry v. McCanless, 307 U.S. 357, 59 Sup. Ct. 900, 123 A.L.R. 162, 83 L. ed. 1339 (1939).
[136]LAND, TRUSTS IN THE CONFLICT OF LAWS (1940) 94.

is deemed to "govern"[137] the validity of a trust *may* be utilized *either* as a "power recognizing rule," *or* as a "choice of law" rule. Actually however, this is what the case does: After declaring that securities shall be deemed to have a situs[138] their physical location, it then asserts a legislative jurisdiction in the State of New York *as the situs,* and then further states that, in this particular case, the *situs chooses*[139] to apply its own interest creating rule because the settlor appears to have so expected it. That leaves entirely open the application of quite a different "choice of law" by the situs in other cases where the evidence does not establish the settlor's intent in this respect. The situs' choice of law for the ordinary case may well still be that of the domicil. Most importantly, however, the rules applied in this case control *qua* situs rather than *qua* forum.

Again, in considering what law should govern the "essential validity" of a trust, Mr. Land tells us that,

> "The situation facing the courts in such cases is one of a gift or bequest which allegedly violates one of the restrictive rules of law, such as the rule against remoteness of vesting, the rule against accumulations, or the rule against gifts to charities made within a certain time before death. The question is which one of the contacts or set of contacts is decisive for the purpose of determining which law shall govern the validity of the provisions of the instrument."[140]

Land's answer is that that law should govern having the most immediate interest in the evil against which is directed the particular restrictive rule involved. For example: If the trust is attacked on the ground that it violates the rule against accumulations, the state of receipt and administration should govern as having the greatest interest, because the alleged evil will mature there.[141]

This functional analysis is a very constructive one. However, is it a complete analysis if it does not ask further whether there is some one state

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[137]Perhaps the extremely question-begging character of the term "govern" as used in the formula "the law of the domicil 'governs' succession," should have been noted much sooner. The entire paper emphasizes that fact, however. The very fact that it has not been thought necessary to distinguish carefully between the domicil "governing" only at the sufferance of *another* law, rather than by virtue of an original power recognized to reside in itself does much to reveal the common law pattern for analyzing a conflicts problem.

[138]Though Land treats all trusts, the subject matter of which is corporate securities, as a trust of intangibles, saying that there are few cases involving trusts of tangible personal property, this case demonstrates a strong tendency of the courts to consider the trust certificates as the *res* themselves, and hence, to assimilate such trusts to the law governing tangibles generally, LAND, TRUSTS IN THE CONFLICT OF LAWS (1940) §§ 13, 14 *et. seq.*

[139]Very possibly, the most significant statement made by the Court, for our purposes, is the following: "The maxim that movable personal property follows its owner is restricted to the field within which the state, where that is found, chooses to apply other laws than its own, and modern conditions have caused a limitation of that field to narrow bounds." 187 N.E. at 70.

[140]LAND, TRUSTS AND THE CONFLICT OF LAWS (1940) § 17, pp. 56-57.

[141]*Id.* 57-58.

with such contact with the property that any and all other states (as the forum) consider it desirable or necessary to submit to whatever policy is adopted by that state? Is it not confusing to discuss such question as though it were simply a case of any forum wherever the question arises, having perfect freedom of choice as between these various states having contacts with the transaction, if in fact, it is implicit in the common law that there is no such freedom of choice? If the conclusions of this study are sound, that inquiry is pertinent—and very important.

Though limited to the intestate succession field the conclusions of this study have such a direct bearing on two general problems in Conflict of Laws that, in answering the skeptics referred to above, who would question the value at this study a brief reference to them seems necessary. The question of *renvoi* and of characterization have vexed many authorities,[142] some of whom suggest that they can best be disposed of by ignoring them. The proposition, vigorously asserted by some writers, that the English law approves *renvoi,* is based largely on cases in the succession field. The conclusions of this paper indicate that such proposition should be reconsidered. Further, apparent recognition of *renvoi* in two specific fields, *i.e.,* land and divorce, by the Restatement[143] also commends itself to reexamination. Possibly fully recognizing the existence of two basically different conflict of laws rules, furnishes a new basis for analyzing both *renvoi* and characterization. So it seems that the rule given by the Restatement that the forum should determine all questions of characterization, *i.e.,* of the meaning and legal import of all words and terms that it has to apply, demands further analysis.[144] In the succession field we have found the courts uniformly declaring that the situs alone determines whether a given piece of property shall be deemed movable or immovable. Those cases flout that rule.[145] They cannot be ignored.

These questions are among the several requiring further study elsewhere.

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[142]It would profit nothing to give even a partial listing of the published comments considering these questions, since no conclusions concerning them are attempted here.

[143]RESTATEMENT, CONFLICT OF LAWS (1934) §§ 7-8.

[144]*Id.* §§ 7. Comment b, and 10.

[145]*Cf.* BEALE, CONFLICT OF LAWS (1935) 934. Apparently Professor Beale would harmonize this conclusion with the general statement by the Restatement, Section 7, that the forum determines all questions of characterization, by treating the question of whether a given property is "movable" or "immovable" as being purely a question of fact, "or at least an unchangeable doctrine of that part of the law called the Conflict of Laws." However, immediately he concedes that, "whether a thing is movable or immovable, or more properly, whether it is to be treated as if it were movable or immovable is governed by the law of the situs." It is submitted that that is the only question of legal significance in *any* case of characterization. Once recognizing power to control *all* tangibles in say Louisiana, the situs, Tennessee is no longer concerned in defining any term coming within the broader category of tangibles—as movable or immovable. However, if the question is as to what shall be considered *tangibles,* then the forum must interpret that term because it is found within its own rule of controlling jurisdiction which serves to limit the forum's reference to the foreign law.

THE JUDGE ADVOCATE GENERAL'S DEPARTMENT of the UNITED STATES ARMY*

*A. B. Butts***

I. Organization

The Judge Advocate General's Department of the United States Army is older than the Declaration of Independence and the Constitution, for the office of Judge Advocate of the Army was created during the War of the Revolution by the appointment of an incumbent on July 29, 1775, soon after the adoption by the Continental Congress of the Articles of War on June 30 of the same year. In the reenactment of the articles, in 1776, this office was styled the Judge Advocate General of the Army and was empowered to prosecute in the name of the United States or to conduct such prosecutions by deputy.[1]

With the act of July 5, 1884,[2] the Judge Advocate General's Department by that title came into existence.[3]

The authorized peacetime strength of the Judge Advocate General's Department consists of "one Judge Advocate General with the rank of major general and one hundred and twenty-one officers in grades from colonel to captain, inclusive."[4] No officer below the rank of captain is commissioned in the Department, though first and second lieutenants of other branches of the service may be assigned to duty *with* the Department. The Department has no enlisted personnel. Warrant officers and enlisted men, however, are detailed as clerical assistants.

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*The author wishes to express his thanks to Colonel Robert V. Laughlin, Colonel Robert M. Springer and Major William F. Fratcher, all of the Judge Advocate General's Department, for valuable suggestions in the preparation of this article. The author alone is responsible for any errors; and although he is a Reserve Officer in the Judge Advocate General's Department, and on duty as a lieutenant colonel, the opinions herein expressed are his own, and not necessarily those of the Judge Advocate General or the War Department.

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[1]Military Laws of the United States (Annotated), Eighth Edition, 1939, Sec. 62, pp. 52-55. See, also, Winthrop's Military Law and Precedents, Reprint 1920, pp. 21-22.

[2]23 Stat. 113.

[3]For brief history of the Office of Judge Advocate General and of the Department, see Military Laws of The United States, Eighth Edition, 1939, Secs. 62-64, pp. 52-56.

[4]Army Regulations 25-5, May 7, 1942; See sec. 8, National Defense Act, as amended by act June 4, 1920 (41 Stat. 765), and sec. 8, act April 3, 1939 (53 Stat. 558; 10 U. S. C. 61, 481b; M. L. 1939 and Sup I, sec. 62).

II. Personnel.

The one hundred and twenty-two officers of the Judge Advocate General's Department of the Regular Army, the Army lawyers or military lawyers of the United States, come to their offices by three routes:

First, there are the officers of the Regular Army who were lawyers before they were commissioned in the Army. Following World War I a number of lawyers were retained in the Regular Army in one branch or another. Many of them, especially first lieutenants, were subsequently assigned to duty *with* the Judge Advocate General's Department, and later the majority of them were transferred to fill vacancies *in* the Judge Advocate General's Department caused by death or retirement. No officer legally could be transferred to the Department until he reached the grade of captain. The majority of senior officers now in the Judge Advocate General's Department of the Regular Army fall in this group.

Second, beginning about the fall school term of 1928, officers of other arms or branches of the service, after careful selection by The Judge Advocate General, were assigned to duty *with* the Judge Advocate General's Department, and at Government expense sent to one of seven selected and approved university law schools[5] for the regular three-year course. Upon graduation these officers were assigned to duty *in* the office of The Judge Advocate General and a majority of them were placed on special duty for approximately one year with the Department of Justice. After completion of this detail the officers were transferred for duty in the Office of The Judge Advocate General, and after six months to one year of satisfactory service in various sections of the Judge Advocate General's Office, were considered for transfer to the Department.

It is interesting to note that with certain minor exceptions all such officers were subsequently transferred, upon reaching the statutory requirement of the grade of captain. It is believed that all of this group have now attained the temporary rank of colonel or lieutenant colonel.

Third, Judge Advocate General Reserve Officers have been and still may be permanently commissioned in the Judge Advocate General's Department of the Regular Army. Such appointments are always limited by the existence of vacancies not filled by transfer or detail from another arm or service.[6]

Laws governing appointments to the Judge Advocate General's Department from Officers of the Reserve Corps of the Department provide that

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[5]In recent years officers have been sent as students by War Department orders to the following University schools of Law: Harvard, Yale, Columbia, Virginia, California, Georgetown, George Washington.

[6]Army Regulations 605-35, May 29, 1939, Sec. 1, par. 2d.

> "any vacancy in the grade of captain in the Judge Advocate General's Department, not filled by transfer or detail from another branch, may, in the discretion of the President, be filled by appointment from Reserve judge advocates between the ages of thirty and thirty-six years, and such appointee shall be placed upon the promotion list immediately below the junior captain on said list."[7]

To be eligible for original appointment, a candidate must at the time of appointment be

a. A male citizen of the United States.
b. Between the ages of 30 and 36 years.
c. A Reserve Judge Advocate.

In regard to examinations for appointment in the Judge Advocate General's Department of the Regular Army from the Reserve Corps Judge Advocates, regulations provide

> "Candidates who present properly attested transcripts of records from an accredited law school showing completion of required courses may, in the discretion of the examining board, be exempt from examinations in all such subjects except military law and military justice. Candidates who have had extended active duty with the Judge Advocate General's Department may, in the discretion of the board, be exempt from examinations in military law and military justice upon the recommendation of a chief of division or other judge advocate under whom he has served. Candidates are not required to take exemptions, but may, if they so elect, take examinations in subjects in which entitled to exemption. An arbitrary grade of 85 will be awarded in any subject in which advantage of exemption is taken, and the candidate will be so informed. If the candidate elects to be examined he must abide by the marks awarded on his examination."[8]

The physical examination required of all officers of the Army must be passed by all candidates for appointment in the Judge Advocate General's Department.

Since an applicant for appointment in the Judge Advocate General's Department of the Regular Army must be a reserve judge advocate, the requirements for appointment as a reserve judge advocate should be examined.

No appointments in the Judge Advocate General's Department, Reserve Corps or Regular Army, are made below the grade of captain.

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[7]Army Regulations 605-35, May 29, 1939, as changed by, Changes No. 1, War Department, May 26, 1942. See, Sec. 24e, National Defense Act, as added by Sec. 24, act June 4, 1920 (41 Stat. 774), and reenacted by Sec. 7, act April 3, 1939 (53 Stat. 558; 10 U. S. C. 64; M. L., 1939, and Supp. 1, Sec. 126).

[8]Changes No. 1, War Department, May 26, 1942, to Army Regulations 605-35, May 29, 1939.

Original appointments are made in the grade of captain only.[9] For original appointment in the grade of captain the minimum age requirement is thirty years, and the maximum age requirement thirty-six.[10]

Other requirements for appointment in the grade of captain are:

(1) Membership in good standing of the bar of the highest court of a State or Territory, the District of Columbia, or a territorial possession of the United States, and

(2) Experience in the actual practice of law, or as a teacher of law in a law school of recognized standing, or as a holder of judicial office, or in any two or more of those activities, as follows:

(a) For appointment in the grade of captain, 4 years;

(b) For promotion to the grade of major, 9 years; lieutenant colonel, 15 years; colonel, 22 years.[11]

As has been noted, the maximum number of officers in the Judge Advocate General's Department of the Regular Army is limited by law to one hundred and twenty-two, that is, The Judge Advocate General, with rank of major general, and "one hundred and twenty-one officers in grades from colonel to captain, inclusive." This is the peacetime strength of the legal department of the Regular Army. It should be noted that from 1926 to 1942 the authorized peacetime strength of the Department was one hundred and fifteen officers, that is "one Judge Advocate General with the rank of major general and one hundred and fourteen officers in grades from colonel to captain, inclusive."[12]

At the beginning of World War II there were approximately five hundred Reserve Judge Advocates. The highest number of Reserve Officers on duty in the Judge Advocate General's Department at any time during World War I was three hundred and seventy-three.[13]

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[9]It should be noted that this applies to the Reserve Corps, J. A. G. Department, and not to temporary appointments in the Army of the United States for the duration of the war.

[10]Changes No. 1, War Department, May 26, 1942, to A. R. 605-35, May 29, 1939.

[11]Changes No. 1, War Department, May 26, 1942, to Army Regulations 140-32, August 9, 1940, J. A. G. Department, dealing with special limitations on appointment, reappointment, and promotion in the Judge Advocate General's Department.

[12]Army Regulations 25-5, August 30, 1926. The number of officers prescribed in the 1920 act (c. 227, subchapter 1, Sec. 8, 41 Stat. 765) was one hundred and fourteen, but was reduced to "one Judge Advocate General with the rank of major general and eighty officers in grades from colonel to captain, inclusive" by the provisions of the 1922 act (c. 253, 42 Stat. 723) for assignment of 70 per centum of the number of officers prescribed under the 1920 act. See, U. S. Code Annotated, Title 10, Army, ch. 5, Sec. 61, p. 20.

[13]Published in mimeograph form "The Judge Advocate in the Field and in The Office of the Judge Advocate General," a lecture to Reserve Judge Advocates at a conference October 28, 1935, by Colonel Hugh C. Smith, J. A. G. D., Assistant to The Judge Advocate General.

With the Army being expanded to unprecedented numbers, the one hundred and twenty-two Regular Army Judge Advocates and the approximately five hundred Reserve Judge Advocates, with approximately sixty National Guard Judge Advocates, did not constitute an adequate number of lawyers to do the work required of the Department. Hence it became necessary to bring into the Army of the United states (which is composed of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the Enlisted Reserve Corps, inductees, and persons temporarily appointed or enlisted in the Army of the United States) some additional judge advocates. These additions were made in two ways; first, by selecting for temporary commissions in the Army of the United States a number of lawyers from civilian life, in the grades of major and captain (with two exceptions: one colonel who was a World War I officer, and one lieutenant colonel); and second, by appointment as officers in the Army of the United States in grade of lieutenant of warrant officers and enlisted men already in the service for duty *with* the Judge Advocate General's Department. In this latter category provision is made[14] for temporary appointment as officers in the Army of the United States of warrant officers and enlisted men of the Army who (1) have excellent records, (2) have more than four months' enlisted service, (3) are duly licensed attorneys at law in good standing, and (4) have practical experience in the practice of law.[15] Thus opportunity was afforded many lawyers who entered the Army by enlistment or under the Selective Service Act to apply for temporary commissions for duty *with* the Judge Advocate General's Department. Officers in grades from colonel to captain, inclusive, in other branches are eligible for and may be transferred to and given temporary wartime commissions in the Judge Advocate General's Department under certain conditions.

It will thus be noted that at the present time there are serving in the Judge Advocate General's Department of the Army of the United States four groups of military lawyers:

(1) Regular Army judge advocates (including a number of retired Regular Army officers on active duty);

(2) Reserve judge advocates;

(3) National Guard judge advocates;

(4) Judge advocates holding temporary wartime commissions in the Army of the United States, including a number of second and first lieutenants, lawyers who have entered the Army as enlisted men since the National emergency was declared.

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[14]Memorandum No. W605-4-42, War Department, August 28, 1942.

[15]It is stated that "four years' experience is desirable but it is not essential for appointment in grades below that of captain." W. D. Memorandum No. W-605-4-42, August 28, 1942.

The number of judge advocates on duty in the Army of the United States will of course increase as the Army increases. Most of the Regular Army Judge Advocates and many of the Reserve Judge Advocates now hold temporary grade in the Army of the United States one or two grades higher than their Regular Army or Reserve Corps commission. The peacetime strength of the Department of "one Judge Advocate General with the rank of major general and one hundred and twenty-one officers in grades from colonel to captain, inclusive" applies in the present war period as to the total number of Regular Army Judge Advocates, but not as to rank; for at present, in addition to The Judge Advocate General, who ranks as a major general, five Regular Army Judge Advocates are temporary brigadier generals.

III. Functions and Duties

The functions of the Judge Advocate General's Department include not only those of The Judge Advocate General and of his office in Washington, but also those of officers serving as staff judge advocates at the headquarters of army, corps area (now designated service command), department, division, and other commands, and those of judge advocates assigned to duty as legal advisers of other officers in particular fields.[16]

The general duties of The Judge Advocate General are defined in Army Regulations as follows:

> "The Judge Advocate General is the chief legal adviser of the Secretary of War, the War Department, and the Military Establishment. He supervises the system of military justice, and in his office the records of all trials by general courts-martial, courts of inquiry, and military commissions are reviewed. (A. W. 50½, as amended; R. S. 1199; M. L., 1939, sec. 63.) The scope of his duties includes the furnishing of advice concerning the legal phases of the business, property and financial operations which are under the jurisdiction of the Secretary of War, and the legal questions growing out of the administration, control, discipline, status, civil relations and activities of the personnel of the Military Establishment."[17]

Writing in 1942, The Judge Advocate General of the Army, Major General Myron C. Cramer, defines the duties of The Judge Advocate General when he says:

> "The Judge Advocate General is the general counsel of the Army, with station at Washington, where he has a considerable number of officers under him. There is also a judge advocate, usually with one or more assistants, at the headquarters of every

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[16]Army Regulations 25-5, par. 1b, May 7, 1942.
[17]Ibid, par. 2a.

> division, corps, army, service command, territorial department, every overseas force or base of importance, and in many other units and places where particularly needed. In all there are 326 commands or stations at which one or more judge advocates are now serving,"[18]

Army Regulations, and the one hundred twenty-one and one-half[19] Articles of War,[20] with amendments[21] (adopted by the Congress as statutes) prescribe the general duties of judge advocates of a command. It is provided that

> "The judge advocate of a command is the legal adviser of the commanding officer thereof and as to that command he performs duties corresponding in general nature and scope to those discharged by The Judge Advocate General with relation to the whole Military Establishment. With regard to military disciplinary action his duties include, among others, the duties devolved upon the staff judge advocate by A. W. 36, 46, and 70, as amended. His functions in time of war or domestic disturbances may include duties in connection with military commissions, provost courts, or other military tribunals, and the furnishing of advice concerning legal questions relating to claims and relations

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[18]Cramer, Major General Myron C., The Judge Advocate General, "The Operation of The Judge Advocate General's Department," Army and Navy Journal, anniversary issue, "United States at War, December 7, 1941-December 7, 1942," page 126.

[19]Article of War 50½ (under which operates the system of appellate review of records of general courts-martial) was enacted at the close of World War I, and inserted following A. W. 50.

[20]See, A Manual for Courts-Martial, U. S. Army, 1928. The Articles of War are a code of military justice of 121 numbered articles, enacted as Section 1, Chapter II, of the act of June 4, 1920 (41 Stat. 787), and since amended in a few minor particulars by the act of August 20, 1939 (50 Stat. 724), which are carried into the United States Code as title 10, Chapter 36, sections 1471-1593. The Articles of War have also been amended by the following War Department Circulars and Executive Orders: Paragraph 30*c*, Circular 79, W. D. 1938; Paragraph 35*a*, Circular 79, W. D. 1938; Paragraph 94, Circular 42, W. D. 1928 (Republished in Cir. 79, W. D. 1928) (Incorporated in 1936 Reprint); Paragraph 104*b*, Executive Order 8727, April 1, 1941 (Bul. 8, W. D. 1941); Paragraph 104*c*, Circular 59, W. D. 1941; Paragraph 104*c*, Executive Order 9048, Feb. 3, 1942—Bul. 6, W. D. 1942 (Suspending the limitations upon punishment for violation of A. W. 61); Paragraph 117*a*, Executive Order 9216, Aug. 7, 1942—Bul. 43, W. D. 1942.

NOTE: The word "recommitted" in line 2, A. W. 58 (p. 218, 1936 Reprint) should read "committed". (Cir. 134, W. D. 1942.)

For an excellent discussion of The Army Court-Martial System, see Colonel Archibald King's article by that title, Wisconsin Law Review, May, 1941.

[21]Article of War 50½—Act. of Aug. 20, 1937 (50 Stat. 724)—Bul. 11, W. D. 1937. (Published as a change to M.C.M.—Cir. 79, W. D. 1938; Article of War 50½—Act of Aug. 1, 1942 (Pub. Law 693-77th Cong.)—Bul. 44, W. D. 1942; Article of War 52—Act of Dec. 15, 1942 (Pub. Law 804—77th Cong.)—Bul. 61, W. D. 1942 (Execution of Court-Martial sentences); Article of War 70—Act of Aug. 20, 1937 (50 Stat. 724)—Bul. 11, W. D. 1937 (Published as a change to M. C. M.—Cir. 79, W. D. 1938); Article of War 114—Act of Dec. 14, 1942 (Pub. Law 800—77th Cong.)—Bul. 61, W. D. 1942 (Authority to administer oaths).

of the civil population which may arise in occupied enemy territory or be incident to hostilities or domestic disturbances."[22]

The legal duties of judge advocates are in nowise confined to the administration of military justice, for he is required to perform all the legal functions normally pertinent to general practice of the law and in addition must from time to time answer questions and give opinions upon all phases of patent law, admiralty law, international law, and the laws and rules of land warfare. Corporation law is perhaps the only branch of the law that does not to any great extent impinge upon the Judge Advocate General's Department. The Office of the Judge Advocate General, in wartime, is in fact one of the largest law offices in the world.

For those who desire to visualize more particularly the duties of the Office of the Judge Advocate General of the Army, the complete and official outline of the functions of the Office, as published in the Services of Supply Organization Manual, promulgated by the War Department on September 30, 1942, is quoted in full. Section .08 of the manual is as follows:

Office of the Judge Advocate General

a. Mission.—To serve as the chief law officer of the War Department and the chief legal adviser of the Secretary of War, the War Department, and the Military Establishment. To supervise the system of military justice throughout the Army, the work of all judge advocates of the Army, and the rendition of legal advice and services throughout the War Department and the Military Establishment. To operate the system of appellate review of records of general courts-martial provided by Article of War 50½ and to furnish legal advice and service to all agencies of the War Department.

b. Major Functions.—The office of the Judge Advocate General, under the direction of the Chief of Administrative Services, performs the following functions:

(1) Supervises the system of military justice throughout the Army.

(2) Supervises the work of all judge advocates of the Army.

(3) Supervises the rendition of legal advice and services throughout the War Department and the Military Establishment.

(4) Operates the system of appellate review of records of general courts-martial provided by Article of War 50½ and, for this purpose, establishes branches of his office wherever the Army is serving.

(5) Furnishes legal advice and service to all agencies of the War Department on matters including those relating to claims by and against the Government; contracts with the Government; bonds of Government officials, contractors, land purchases, sales, leases, and grants; State and Federal taxation; litigation involving the War Department; the organization of the War Department and the Army; and the rights and obligations of military and civilian personnel of the War Department.

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[22]Army Regulations, 25-5, par. 3b, May 7, 1942.

(6) Controls and coordinates all patent activities of the War Department.

(7) Represents the War Department in all litigation involving the department, except litigation arising out of rivers and harbors, flood control, and Washington aqueduct activities, and maintains liaison with the Department of Justice in connection with such litigation.

(8) Recommends the appointment, assignment, and reassignment, and conducts the training of all judge advocates of the Army.

(9) Maintains the office of record of all records of general courts-martial, military commissions and courts of inquiry; all documents relating to the title to lands outside the District of Columbia under the control of the War Department; War Department patent assignments and licenses; and the records of the Army Section, Army and Navy Patent Advisory Board.

(10) Prepares for publication the following War Department publications, supplements thereto, and changes therein:

Military Laws of the United States; Military Reservations; Digest of Opinions of The Judge Advocate General of the Army; Bulletin of The Judge Advocate General of the Army.

(11) Maintains the Military Law Library.

c. Organization.—

(1) The Office of the Judge Advocate General consists of the Judge Advocate General, two Assistants to the Judge Advocate General, the Executive Division, two statutory Boards of Review, the Military Justice Division, the Military Personnel Division, the Judge Advocate General's School, the Military Affairs Division, the Claims Division, the Contracts Division, the Patents Division, the Military Reservations Division, the War Plans Division, the Tax Division, and the Litigation Division.

(2) One Assistant to the Judge Advocate General supervises the Executive Division, the Boards of Review, the Military Justice Division, the Military Personnel Division, and the Judge Advocate General's School, and acts as chief adviser to the Judge Advocate General with respect to the system of military justice throughout the Army and the selection, training, and supervision of judge advocates.

(3) The other Assistant to the Judge Advocate General supervises the Military Affairs, Claims, Contracts, Patents, Military Reservations, War Plans, Tax and Litigation Divisions, and acts as chief adviser to the Judge Advocate General with respect to the furnishing of legal advice and service to agencies of the War Department and the supervision of the rendition of legal advice and services throughout the War Department and the Military Establishment.

(4) The executive Division consists of the Control Branch, the Supply Branch, the Civilian Personnel Branch, the Library Branch, the Research Branch, and the Message Center Branch. The Executive, under the supervision of the Judge Advocate General and the Assistant to the Judge Advocate General, has general administrative supervision of the office of the Judge Advocate General, including matters relating to civilian personnel, military personnel, war plans for the Judge Advocate General's Office, financial estimates (except for travel of officers), supplies, equipment, library, publications, records, indexing and digesting, etc. He also checks all papers prior to action by the Judge Advocate General.

(a) The Control Branch obtains information regarding the efficiency of the operations of all elements of the office

of the Judge Advocate General and the progress of the work of the office; studies the organization of the office, its research facilities, administrative procedures, procurement of supplies, and reports of work done; recommends changes in existing policies, organization, personnel, procedures and methods to overcome situations requiring corrective action, and prepares directives to carry out such changes; supervises preparation of the Bulletin of the Judge Advocate General of the Army, keeps the historical record, and performs the public relations work of the office.

(b) The Supply Branch performs office service functions.

(c) The Civilian Personnel Branch handles all matters pertaining to the appointment, pay, promotion, and transfer of civilian personnel of the office of the Judge Advocate General.

(d) The Library Branch operates the central library of the office of the Judge Advocate General, supervises the libraries of the divisions of the office, and supervises the libraries of the offices of judge advocates in the field.

(e) The Research Branch files and indexes all opinions of the Judge Advocates General of the Army and the Boards of Review rendered since 1842 and all records of general courts-martial, military commissions and Courts of Inquiry appointed under authority of the United States since 1811. Compiles new editions of and supplements to the Military Laws of the United States and the Digest of Opinions of the Judge Advocate General of the Army. Under the supervision of the Chief, Control Branch, compiles the Bulletin of The Judge Advocate General of the Army. Maintains a legislative reference service. Assigns requests for opinions of The Judge Advocate General to divisions.

(5) The Boards of Review exercise independent statutory duties under the provisions of Article of War 50½; review court-martial records other than those coming within the purview of Article of War 50½, when specially referred to the Boards; examine records of Courts of Inquiry; and conduct correspondence relating to such records.

(6) The Military Justice Division consists of the Clemency Branch, the Examination Branch, and the Miscellaneous Branch.

(a) The Clemency Branch examines all incoming court-martial records for the purpose of finding whether the sentences are within the allowable maximum limits and whether clemency should be extended immediately; handles all court-martial cases with a view to equalization of sentences; notes contents of holdings of Boards of Review; maintains equalization of sentence ledger; and prepares recommendations for clemency to be made to The Adjutant General.

(b) The Examination Branch examines as to legal sufficiency records of trial by general courts-martial and military commissions which do not come within the purview of the Boards of Review; communicates directly with staff judge advocates in the field for instruction purposes and with a view to corrective action, and prepares necessary memoranda transmitting records found legally insufficient for reference to a Board of Review under the provisions of Article of War 50½.

(c) The Miscellaneous Branch prepares opinions on points of law and procedure arising in the administration of military

justice; sends out information covering military justice matters to judge advocates in the field, including military justice notes in the Bulletin of The Judge Advocate General of the Army; assists in the presentation of the Government's view in habeas corpus proceedings involving persons subject to military law; prepares recommendations to The Adjutant General with respect to the granting of general court-martial jurisdiction; and prepares recommendations to the Secretary of War with respect to wartime maximum sentences.

(7) The Military Personnel Division consists of the Assignment Branch, the Classification Branch, the Administrative Branch, and the Miscellaneous Branch. It conducts the military personnel administration of the Judge Advocate General's Department including all functions of the Judge Advocate General relative to procurement, assignment, transfer, reclassification, relief from active duty, discharge, retirement, promotion, decoration, and discipline of judge advocates of the Army and officers of the Army Specialist Corps assigned to the Judge Advocate General's Department.

(8) The Judge Advocate General's School trains judge advocates and candidates for appointment or assignment as judge advocates

(9) The Military Affairs Division consists of the Officers Branch, the Enlisted Branch, and the Miscellaneous Branch. The division prepares opinions on questions of status, promotion, discharge, retirement, discipline, and administration of military and civilian personnel, and the organization of the War Department and the Army; prepares and revises drafts of legislation, reports, executive orders, and regulations relating to the foregoing matters; and prepares opinions on questions of law involving interpretation of laws and regulations not specifically allocated to other divisions of the office.

(10) The Claims Division prepares opinions on administrative and legal questions pending in the War Department involving claims for and against the United States, arising out of contract, admiralty and maritime matters, and tort claims arising in the administration of the various claims statutes; prepares opinions on laws and procedures incident to claims and related matters, including reports to Congress on pending legislation, particularly private bills for relief; prepares drafts and revisions of Army Regulations relating to the foregoing matters, and maintains liaison with other agencies and departments relative thereto.

(11) The Contracts Division consists of the Contracts Branch and the Bonds Branch. The Chief of the Contracts Division, in addition to his duties as such, acts as contracts coordinator. In this capacity, he coordinates the legal work connected with Government contracts done by the Contracts, Patents, Tax, and Litigation Divisions of the office of the Judge Advocate General and by legal agencies of the War Department outside that office.

(a) The Contracts Branch prepares opinions on questions of law as to the nature and extent of authority to contract; the availability of appropriations to contract; advertising, opening and awarding of bids; the negotiation, form, legal sufficiency, of original and supplemental contracts and change orders; advance payments; rights and obligations arising upon modification, extension of time, renewal, performance, delay, and breach of contracts; debarment of bidders; the assessment of liquidated damages; emergency purchases; acceptance of donations; the sale, lease, exchange, and other disposition of personal property; the construction and opera-

tion of contract provisions for unemployment, workmen's compensation, liability, and other forms of insurance.

(b) The Bonds Branch examines as to legal sufficiency, form and execution, fidelity and surety bonds (bid bonds excepted), and consents of surety to modification of contracts; and maintains, for the War Department, files of powers of attorney indicating authority of representatives of authorized surety companies.

(12) The Patents Division supervises collection and preparation of evidence for use by the Department of Justice in defense of patent infringement suits filed against the United States; maintains files of patent assignments and licenses; prepares, files, and prosecutes applications for patents, interferences, and appeals; makes patent validity and infringement searches; renders opinions on questions of patent and copyright laws; and maintains the records of the Army Section, Army and Navy Patent Advisory Board.

(13) The Military Reservations Division consists of the Titles Branch, the Publications Branch, the Records Branch, and the Miscellaneous Branch.

(a) The Titles Branch prepares opinions on questions of law pertaining to the acquisition, title, possession, and disposition of real property under the control of the Secretary of War, including questions relating to condemnation, purchase, title, encumbrances, limitations, boundaries, possession, transfers, deeds, easements, and leases; and drafts documents incident thereto.

(b) The Publications Branch prepares the War Department publication "Military Reservations."

(c) The Records Branch classifies, indexes, files, and preserves title records pertaining to military reservations and other land under the control of the Secretary of War, including deeds, easements, leases, licenses, and permits.

(d) The Miscellaneous Branch prepares opinions on questions of law relating to State and Federal jurisdiction over military reservations and other lands under the control of the Secretary of War; the administration of such property, including custody, control, buildings, roads, materials, licenses, and permits; flood control; and to the regulation, improvement, and use of navigable waters of the United States.

(14) The War Plans Division prepares opinions on questions of law involving the laws of war, international law, military government, martial law, prisoners of war, internment of enemy aliens, billeting of troops, and related subjects.

(15) The Tax Division prepares opinions on questions of law in which the principal problem is one as to the applicability of a Federal, State, or local tax; cooperates with other divisions of the office in the preparation of opinions in cases in which tax questions are presented incidentally; and conducts correspondence and conferences with State and local authorities for the friendly adjustment of controversies concerning the applicability of Federal, State, and local taxes to War Department and Army agencies, personnel, and activities.

(16) The Litigation Division takes or prepares all action required of the Judge Advocate General by AR 410-5 with relation to litigation affecting the War Department, excepting matters expressly assigned by the Judge Advocate General to other divisions or officers; arranges

with the Department of Justice for proper representation of the interests of the Government in all such litigation, and cooperates with that Department in producing witnesses and documentary evidence as required; furnishes counsel to represent the War Department before Federal and State administrative tribunals in proceedings affecting the interests of the War Department; and (while these offices continue to be widely separated) provides such special liaison as may be required between the offices of the Secretary of War, the Under Secretary of War, the Assistant Secretary of War, and the Assistant Secretary of War for Air, as well as other War Department offices located in Washington, D. C.

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AN OUTLINE OF NAZI CIVIL LAW

*William J. Dickman**

Knowledge of the Nazi Civil Legislation alone will not convey an idea of the effect of the totalitarian doctrine to American lawyers unless it is borne in mind that Germany is ruled at present exclusively by the Nazi party which is in complete control of the legislative, the administrative and the judicial branches of the government.

The influence of the judiciary in carrying forward the ideas of the Nazi doctrine in the Civil Law is thereby of minor importance when compared with the dominant role which is exercised by the courts in the Anglo-American countries. Dictatorial government uses the efficient and quick legislative machinery, functioning in cabinet sessions rather than relying on the slow process of judge-made law for reaching its objectives. Where these enactments meet resistance or insufficient approval among the population, the political pressure of the Nazi party through its manifold channels is applied to make them work. Therefore, relatively little reference to decided cases has been made in this outline; they are in most instances mere illustrations of the operation of the new laws.

The Nazis came to power on January 30, 1933, and almost immediately thereafter revolutionary changes in constitutional and administrative law took place. The structure of the Weimar Republic of 1919 was destroyed. The decree of February 28, 1933, suspended the Bill of Rights. Free speech, free assembly, the free bargaining process of labor, personal freedom, all were abolished.

The new rulers also repudiated the existing Civil Law. In a meeting before high ranking Nazi law officials early in 1933 the Commissar of Justice, Dr. Frank, made it clear that the Civil Law could not remain immune from the new doctrines and that it would have to be written anew in accordance with the party program of 1920.

Almost with "Blitzkrieg" speed the machinery of legislation went to work and the semi-official collection of new laws from 1933 up to the outbreak of the war between the Allies and Germany in 1939 covers 33 volumes. The new series, started at the beginning of the war, is developing with even greater speed.

The Party program proclaimed the goal: "A German law for the German people." It is used as a popularizing slogan. In order to promote this goal the "Academy of German Law" was founded in 1934 and

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vested with the character of a public corporation. It consists of up to three hundred members, chosen from the legal profession, but, of course, all are party men or at least sympathizers. The president of the Academy is appointed by Hitler himself; the members are appointed by its president. It is the office of this institution to make legislative drafts for the cabinet and to give expert opinions concerning problems of the new legislation.

Three main ideas characterize the doctrines of Nazi Civil Law:

I. The anti-democratic principle of absolute submission to leadership,

II. The anti-individualistic principle that "common interest supersedes private interest," and

III. The racial concept.

I.

The first principle led to the destruction of the representative government; the Reichstag remained in existence only as a sham institution and consists only of members of the Nazi party. All other parties have been dissolved, the forming of any other political organization has become unlawful. Instead of the Reichstag, the cabinet is the exclusive legislature without any kind of parliamentary check or control. Deliberation and majority vote are superseded by concentration of authority and unity of command. Supported by a ruthless police machinery, as a vital part in the one-party organization, the new ideas in the law take effect with surprisingly quick results.

The infiltration of Nazi doctrines into the Civil Law was accomplished most effectively by the law of December 12, 1933, establishing the unity between the State and the National Socialist Party. From its enactment on, no law could be passed without formal sanction of the party. Rudolf Hess, Nazi No. 2, now a prisoner of war in England, became the first minister without portfolio in the cabinet in which, at that early stage of Nazi power, several conservatives were still members, such as von Papen and von Neurath. It became his job to see to it that both legislation and administration of law the Nazi doctrines took root speedily and thoroughly.

Only very few judges were members of the Nazi party when it rose to power. Shortly thereafter lists were circulated in all courts through the channels of administration "inviting" the judges to join the party ranks. The offer was merely "suggestive," however, accompanied by the "hint" that in short the lists would be closed. Every judge understood the implications of this invitation and there were only a few who dared not to sign up. Those who did were aware that it meant the end of their career.

The leadership principle has found its way into the Courts of Civil Procedure. The old Civil Procedure Act of 1877 and its amendments were liberal pieces of codification which left the manner of proceeding to a large extent to the parties and their counsel, while the court had more or less the position of an umpire. Roughly speaking, there were no fundamental differences between the Anglo-American and the German Civil Procedure, except perhaps for the lesser emphasis on cross examination in Germany.

This has been changed by the Reform of the Civil Procedure. The position of the presiding judge in the Court has become dominant and the parties and their counsel are but assistants to the Court in finding the law. The presiding judge has become the "leader" as in other fields of the functioning of the party organization. His decision, in many instances, binds the court as to the manner of proceeding. The liberalistic ideas of pleading as a "fair play" are discarded. No stipulations are allowed any more. The court has to find the truth. "The authoritarian state will not tolerate that its judges are lied at . . ."[1] There are voices who demand to substitute the "trial-maxim" by the procedure applied in criminal proceedings. In other words: to clothe the civil courts with investigatory power and to give the civil judge a position similar to that of a public prosecutor.[2] The distinctions between civil and criminal procedure are dwindling in a totalitarian regime.

Judgments by default may not be rendered if the facts on which the claim is based are known to the court to be untrue.[3]

The position of attorneys has undergone a fundamental change. In a democracy the lawyer is the advocate of freedom from encroachment by arbitrary government, the defender of civil rights. Where the dictatorial policy of the government, and not the constitution, is the factor that counts in the courts, and where the judges have to watch out not to displease Nazi officials by decisions influenced by the remnants of the liberal era, where the word of the Fuehrer is the supreme law of the land; there is no room for argument about invasion of individual rights of the citizen.

The lawyers have become agents of the government. They are organized in a professional organization which is entirely Nazi dominated. The influence of the profession has steadily shrunk. Hardly any branch of business is left free from governmental control and regulation. Even private life is shaped along the Nazi lines and consequently little room is left for the initiative of the individual and for counsel.

Another application of the leadership principle may be found in the Corporation Law. Under the old law the share company has three organs: The shareholder's meeting, the director (or board of directors)

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[1]Bernhardt, Die Wahrheitspflicht im Zivilprozess D. J. Z. (1936), p. 1406.
[2]A. G. Gelsenkirchen, August 7, 1935.
[3]Bernhardt, Die Wahrheitspflicht im Zivilprozess D. J. Z. (1936), p. 1409.

and the council of supervision. The shareholder's meeting assembles at least once annually to do various kinds of business, particularly to settle the accounts of the company. It may meet on further occasions if so held necessary by the board of directors and the council of supervision. The latter is elected by the shareholders' meeting. It consists of a minimum of three members. Members of the council of supervision cannot be members of the board of directors at the same time. The director or board of directors is elected by the council of supervision or the shareholders' meeting according to the by-laws of the company. It is his office to manage the business while the council of supervision has some functions of check or control.

The new Act[4] has deprived the shareholders' meeting of the right to settle the yearly accounts of the company and has vested it in the council of supervision and the director or board of directors instead, thus shifting this important function from the democratic shareholders' meeting to the organs of the company representing the leadership principle.

The second restriction placed upon the shareholders' meeting is that under the new Act it cannot decide questions relating to the management of the company business unless the director or the board of directors so require.

On the other hand, the principle of leadership has been strengthened by a provision that in cases of disagreement between several members of the board of directors as to questions of management, the presiding member of the board, not the majority shall decide authoritatively.

The number of members of the council of supervision has been limited by the Act according to the amount of capital invested in the corporation and varies between not less than three and not more than twenty, a provision which again tends to strengthen the responsibility of the few rather than leaving it in the hands of an unlimited number.

II.

The phrase "common interest supersedes private interest" has become the most popular slogan in the political propaganda. Applied in thousands of speeches, broadcasts and pamphlets, and displayed on huge banners throughout the country for years, it has developed into a sort of National Socialistic credo. Legal writers have pointed out that this slogan contains not only a direction given to the legislature, but also a command to the citizen in the exercise of his private rights and, above all, a measuring stick for the interpretation of legal rules.

In some instances the legislature deemed it even necessary to make such interpretation of the new statutes binding. Section 1 of the General Taxation Law of 1934 (Steueranpassungsgesetz) e. g. provides that its

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[4]Mann, The New German Company Law and Its Background, J. Comp. Leg. xix.

interpretation has to be done in accordance with National Socialist principles. An example of how this works may be given: Under the old system of law, lodges which fulfilled ethical purposes were privileged as to certain kinds of taxation. Ever since the Nazis came to power, however, free mason lodges were looked upon as a link in "conspiracy of world powers against National Socialism," and consequently, in spite of their ethical purposes, were put on the same footing as Liberals, Communists or Jews, in other words, they come, by way of interpretation, under the same classification under which all those come who do not fit in the Nazi pattern. Thus these lodges were deprived of their tax privileges.

While the French Revolution fought for the idea of freedom of the individual, "the new regime in Germany stands for the subordination of the individual to the community."[5] As a consequence of this tendency, an all-out attack against the Roman element in the German Civil Law was launched. Roman law had since the middle ages become an integral part of the German law system and formed, together with French law and old Germanic law elements the factors out of which the German Civil Code of 1900 had been formed. Now, this Roman element is regarded as "un-German" and therefore undesirable. "Roman" is used as synonym for individualistic, which term, however, following the German-Italian alliance, was replaced by the term "Jewish." It is for the sake of propaganda, often contrasted with the "purely" Germanic elements in the law in which the "community spirit" is said to prevail over the selfish interests of the individual. Nationalistic, anti-capitalistic and anti-liberal tendencies are used interchangeably in eliminating the last remnants of the Roman element from the Civil Law. Historically, the integration (reception) into the German law by the Roman law during the middle ages is being blamed for having dissolved every connection between law and race. The law is explained now as the expression of the "racial spirit" of the people, a formula somewhat related to the ideas of the Historical School of Jurisprudence during the 19th century, whose founder and leading scholar, von Savigny, characterized the law as the expression of the "people's spirit" ("Volksgeist").

An official commission of legal experts is at present at work to draft a "People's Code of Germany."[6] It will, when enacted, abolish the liberal German Civil Code of Germany, in force since January 1, 1900, one of the great continental codes of the 20th century, and will be based exclusively on the National Socialist ideology. Numerous partial changes have already been made.

One of the most striking examples for the anti-individualistic tendency in the Nazi Civil Law is the Farm Inheritance Act of 1933 (Reich-

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[5]Gerland, Rechtserneuerung und Revolution (1933), D. J. Z. 1066.
[6]Hedemann, D. J. (1940), 1340.

serbhofgesetz).[7] It is the legal realization of the theory of "Blood and Soil" as developed by the Minister of Agriculture Darre in his book bearing the same title. It is premeditated on the idea that the farmers are the most vital and essential group of the German race. Their survival, as stated by the official introduction, has preserved the characteristics of the nation throughout the ages and their continued existence upon the inherited soil ("angestammte Scholle") has to be guaranteed by the state for the generations to come. For this reason the farm unit has been made a special entity (Erbhof) vested by the act with certain unusual privileges.

The act applies to farmers who own a farm big enough for one family to live on. It can only be inherited by intestacy; the sole heir is the oldest son (primogeniture of the male issue). It can neither be alienated nor mortgaged. Levying on it by private creditors is, for all practical purposes, made impossible and illegal; levying even for taxes is restricted to narrow limits. Testamentary dispositions not in accordance with the act are void. The disinherited other children are entitled to live on the farm and must be boarded there at the expense of the heir until they become of age. Even afterwards, on becoming destitute, they may live on the farm free of charge in return for work done there. In other words, in the interest of preserving the farm undivided as a unit, the conflicting interests of the other children have to yield.

In the same way are the interests of the creditors of the farmer disregarded. Even in cases in which the farmer, before the Farm Inheritance Act, had agreed to give his creditor security on the land, it was decided that such an agreement cannot be carried out.

The consequence of the Act was that the farmer was left to his personal credit. On the other hand the Act provided that special courts, vested with exclusive jurisdiction for all cases coming up under the Act (Anerbengerichte) could, on application of the leader of the Districts Nazi Farmers organization (Landesbauernfuehrer), deprive him, for reasons of mismanagement, of the right to operate the farm and to dispose of it otherwise in accordance with the Act. In this predicament the Act provides that a creditor who wants to levy execution against a farmer can only do so after he has notified the local Nazi farmers leader (Kreisbauernfuehrer) one month ahead of time of his intent; whereupon the local Nazi farmers' organization by a written declaration of its leader may notify the creditor that it will assume the obligation in question. This declaration invalidates the creditor's title as against the farmer. The creditor is now bound to come to terms with the Farmers' organization which is organized locally, district-wise and all over the country in a central organization, Reichsnaehrstand. The fact that this organization is but a branch of the almighty Nazi Party organization

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[7]Hedemann, D. J. (1940), 1340.

gives him little, if any, chance to arrange on his terms. Even in cases where for one reason or the other the debt is not being assumed by the farmers' organization, the political influence of the local and, in case of necessity, of the district's farmers' leader has proven to be strong enough to bring about a submission to the suggestions of the organization. No farmer nor creditor will dare to take upon him the odium to obstruct the putting into effect of the Act which, from the beginning, seems to have had the special attention of the highest ranking Nazi officials.

Under these circumstances and in a blockaded economy where farm products are being badly needed, a class of farmers is being created which has a unique position within the totalitarian economy. It holds this position at the expense of the non-heirs and of the creditors.

When time goes by, this Act will produce a type of farmers with certain new-feudalistic features—an aim absolutely within the scope of the theory of "blood and soil."

III.

Typical for National Socialist ideas in the law are the vast body of enactments applying the race theory. Their goal is to make Germany a community, tied together by bonds of "pure" blood rather than by common language, culture, history, or of all the other elements which, in the generally accepted theory, form a nation. They are also the most striking example of the destruction of equality before the law, and utter disregard for the rights of minorities.

"Purity of race" has become the foremost objective of the Nazi legislature.

As to Divorce Law the Supreme Court of Germany has held that a marriage can be declared void when the Aryan party whose spouse was of Jewish or part Jewish blood had no knowledge of this fact when the marriage was performed, or when he only knew of the religious affiliations of the other spouse without being aware of the racial differences, or, when so informed, was not aware that the other spouse would be able to convey the characteristics of the Jewish race to the common issue.[8] In a later decision even the possibility of Jewish blood in the other spouse was declared to be sufficient to grant divorce.[9] Divorces based on similar facts are easily granted by the courts. The bond of marriage may be severed when the party program so demands.

Along with the various new laws in the field of eugenics, the anti-semitic Nuremberg-laws of 1935 were enacted to serve that purpose. They discriminate between the "Aryan" and the "non-Aryan." They

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[8]R. G. Z. of July 12, 1934, 145, 1.
[9]Dec. of Aug. 22, 1935, IV 128/35.

still exempted a large group of Jews and other "non-Aryans" from their radical discrimination, particularly those who had exercised their professions before 1914 or were in active combat at the front during the World War. Those "privileges" were cancelled by various laws passed after November 8, 1938, and were motivated as "acts of retaliation" against the shooting of the German Consular official, von Rath, in Paris by a young Jew. Now, that minority has lost all civil rights the average "Aryan" citizen enjoys; their licenses as dentists, doctors, lawyers, pharmacists, veterinarians, teachers were cancelled, no matter what merits they or their ancestors had in the past, or for how many centuries their ancestors had lived in Germany. They are excluded from holding any kind of public office. They cannot have positions in theatre, movie, press, literature or any other liberal profession. They have lost the right to exercise the profession of banker, broker, auctioneer, etc. Their business enterprises were forcibly liquidated. Nazi commissars were appointed to manage the business until it was sold or transferred into "Aryan" hands. They had to give up all real estate. It was made compulsory for them to sell to the government at absolutely arbitrary prices all personal property made of gold, silver or other precious metals, pearls and jewelry, as well as all objects of art of a higher value than 1000.00 Reichsmark.

All their shares, stocks and bonds and any other kinds of securities had to be delivered into the hands of the government-controlled banks.

A fine of a billion Reichsmark was imposed on them. Each person had to pay 25 percent of his fortune in cash until this sum was reached, and the whole group was declared jointly liable for the payment. By numerous administrative measures, based on these laws, they have finally been made legal outcasts. Stripped of their fortunes and of any possibility of making a livelihood, the only choice left to them was between emigration or deportation, and the first of these alternatives was open to only a relatively small number.

Only recently those who managed to go into exile and to establish residence abroad were deprived of all their remaining possessions by confiscation and expropriation. They cannot inherit, nor be beneficiaries of devises, bequests or even gifts. Finally they were deprived of their rights as citizens.[10]

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[10]Act of November 25, 1941. R. G. Bl. I, 133.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR

VOL. XV JANUARY, 1943 NO. 2

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NOTES AND COMMENTS

THE SUABILITY OF UNINCORPORATED LABOR UNIONS: THE CORONADO AND VARNADO DECISIONS

A. *Common Law Doctrine*

The problem of suit by or against an unincorporated labor union is of extreme importance because of the increased scope of labor union activity and the resulting heavy increase in union membership.[1] Since it is not usual for labor unions to be incorporated, and it is judgment against a solvent union treasury which will provide the most satisfactory relief, the question becomes one of the extent to which suit in any kind can be brought against the union as an entity. This procedural issue, although by no means the only legal one involved, constitutes the core of the problem.

From very early times we find the doctrine that the courts should not treat any body of men as a legal unit without the consent of the sovereign.[2] Thus, the main factor in answering the practical question of who is responsible for an action of an organized labor union is the legal character of that body. If the body is one recognized by law as a distinct entity, that entity alone is primarily liable, and the individual members are liable only secondarily, if at all. On the other hand, if it is not an entity in the eyes of the law, but a mere collection of individuals, those individuals are primarily liable. Since unincorporated bodies of men, or trade associations, have no existence as units in contemplation of the law, they have no legal standing either to sue or be sued.[3] That principle has been a steadfast one so that today an unincorporated trade association cannot be sued in its association name, in the absence of a statute or case decision, since the association has no legal entity separate and distinct from that of its individual members.

Although it is neither a partnership nor a corporation, the unincorporated trade association, or labor union as used in this discussion, partakes somewhat of the nature of both. In its organization it resembles the partnership; in its operation it more closely assimilates itself to the corporation. Consequently, in determining whether an unincorporated trade association is an entity, for the application of the common law rule, the courts of the forum will look to the state to which created the association; and where statutes are involved, the courts must look to the legislatures' intents to determine whether or not an association constitutes a legal entity.[4]

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[1]The increase in union membership from less than three millions in 1933 to about eleven millions in 1941 graphs a basic change in the economic, social and legal criteria which must be applied to labor suits. See, *Labor Information Bulletin,* Bureau of Labor Statistics, U. S. Department of Labor, June 1942, p. 1.

[2]According to Blackstone, the following three propositions were law: (1) all legal units are either natural persons or artificial persons; (2) artificial persons are called bodies politic, bodies corporate, or corporations; (3) the King's consent is absolutely necessary to the creation of any corporation. 1 Bl. Comm. 467-472.

[3]Warren, Corporate Advantages Without Incorporation (1929) 8-11.

[4]Hall v. Essner, 208 Ind. 99, 193 N.E. 86 (1934).

Yet notwithstanding the common law rule, by most of the authorities, the designation of an unincorporated association as a party litigant in its common name, is deemed to be only a formal procedural defect. If not taken as a matter of abatement, it is considered waived.[5] But as to the precise nature of the defect, as to its specification for the pleader, there is remarkable lack of uniformity.[6]

B. *The Taff Vale and Coronado Decisions and Their Significance*

In view of the rigidity of the common law upon the point of suability of labor unions, there has been, for some considerable time, a determined effort to obviate that stand by other means of suit. Broadly speaking, the common law rule as to suits by a labor union in its name has been modified by court decisions, statutory interpretations and equitable practices, so as to allow action by the unions to an extent commensurate with the facility discovered for such actions against labor unions. It should be noted at the outset that the development of legal suability in behalf of or against the labor union is yet rudimentary. One great reason is that unions have sought relief in equity rather than at law.[7]

The difficulties involved in securing jurisdiction over an unincorporated association at common law were greatly alleviated by the equitable doctrine of representative suits. The extent and meaning of this doctrine were well expressed in the case of *Guilfoil v. Arthur,*[8] where it was said:

> "It is a general rule and one well understood that all persons interested in the subject matter of the litigation should be made parties complainant or defendant. But there are exceptions to this general rule. In section 97, Story Eq. Pl. in speaking of the subject, the author says: 'The most usual cases bringing themselves under the head of exceptions are: (1) where the question of one of common or general interest; and one or many may sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous . . . and it is impracticable to bring them all before the court'."

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[5]Iron Moulders' Union v. Allis Chalmers Co., 166 Fed. 45 (C.C.A. 7th 1908); Jardine v. Superior Court of Los Angeles County, 213 Cal. 301, 2 P.(2d) 756 (1931); United Mine Workers of America v. Cromer, 159 Ky. 605, 167 S.W. 891 (1914). See for discussion of the matter, (1922) 20 MICH. L. REV. 245.

[6]The defect has been treated as (1) no legal capacity to sue; (2) misnomer; (3) non-joinder of parties in interest; (4) lack of certainty of parties. For full discussion of cases see, Sturges, *Unincorporated Associations as Parties to Actions* (1923) 33 YALE L. J. 383. Also see, Kimbrough, *Non-Joinder and Mis-Joinder of Parties in Mississippi Pleading* (1936) 8 MISSISSIPPI LAW JOURNAL 223.

[7]Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931); Rodier v. Huddell, 232 App. Div. 531, 250 N.Y. Supp. 336 (1931).

[8]158 Ill. 600, 41 N.E. 1009, 1010 (1895).

This doctrine has been applied by the equity courts of many states.[9] However, its efficacy as a means of bringing suit against the unincorporated labor union is somewhat impaired since it is viewed as ancillary rather than an original ground of equitable jurisdiction. The principle underlying this doctrine does not base itself on the ground that the members of the unincorporated labor union are so numerous that joinder of all will be virtually impossible or that the members are unknown to the plaintiff, but rather that the common interests of all will be adequately represented by the joinder of a few members whose interests and purposes are identical with the remaining members of the group.[11]

But it is no more permissible in equity than at common law to bring suit against an unincorporated labor union as a legal entity. Equity differs from the common law only in that it may be sufficient to have before the courts some of those who would have been necessary parties if the proceeding had been at common law.[12] The proper method of bringing such persons and labor unions before the court is to join as parties defendant persons who are alleged to be and are proper representatives of the class, describing the class to which the members belong.[13]

The two principal questions facing the litigant who attempts to use the class suit device,[14] in an action for damages are: (1) whether it is available as a means of reaching the common funds of the union and (2) whether it can be used to hold the members of the union individually liable. The first of these problems is answered in *Oster v. Brotherhood of Locomotive Engineers,*[15] where the court said:

> ". . . in equity proceedings, after decree, the chancellor can be moved to compel the defendants to see that the treasury of the association pays the claim."

There is no authority that the equitable procedure of representative suits is applicable to actions at law in the absence of statute.[16]

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[9]Hartford Life Insurance Co. v. Ibs, 237 U.S. 662, 35 Sup. Ct. 692, 58 L. ed. 1165 (1915); Spaulding v. Evenson, 149 Fed. 913 (E.D. Wash. 1906); Guilfoil v. Arthur, 158 Ill. 600, 41 N.E. 1009 (1895); Reynolds v. Davis, 198 Mass. 294, 84 N.E. 457 (1908).

[10]United Mine Workers of America v. Bourland, 169 Ark. 796, 277 S.W. 546 (1925). See 3 STORY, EQ. JURIS. (14th ed. 1918) 1082; and 1 POMEROY, EQ. JURIS. (5th ed. 1941) 178.

[11]Reynolds v. Davis, 198 Mass. 294, 84 N.E. 457 (1908).

[12]Karges Furniture Co. v. Amalgamated Union, 165 Ind. 421, 75 N.E. 877 (1905); Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906); Citizens Co. v. Typographical Union, 178 N.C. 42, 121 S.E. 31 (1924).

[13]Guilfoil v. Arthur, 158 Ill. 600, 41 N.E. 1009 (1895).

[14]See GRIFFITH, MISSISSIPPI CHANCERY PRACTICE (1925) §§ 130 (class suits) and 129 (representative suits).

[15]271 Pa. 419, 114 Atl. 377 (1921). This view is supported by the opinion of Lord Lindley in Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426, 443 (H. of L.).

[16]Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906). In England, the principle of representative suits had, before the *Taff Vale* Case, been extended by the Judi-

Moreover, the common law doctrine which recognizes for the purposes of suit only *entities* of the law, undoubtedly lags far behind the ordinary viewpoint of laymen. The first indication of the tendency to abandon this doctrine, as justice or expediency should require, is the case of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*.[17] This decision of the House of Lords involved the legal status of the English trade unions and incidentally the liability of all unincorporated associations. Plaintiff railway sought an injunction against the defendant society for the alleged illegal picketing by the agents of the defendant; the injunction sought against the agents individually and the society in its registered name was granted in the lower court by Farwell, J. On appeal to the House of Lords, after reversal of the lower court's decision by the Court of Appeal, the Chancellor and other Lords distinctly inclined to the view of regarding the union as legal entity.

Farwell, in the lower court decision, said that a trade union was an association of men which almost invariably owed its legal validity to the Trade-Union Acts, 1871 and 1876. He examined the provisions of those Acts and said:

> "Now, although a corporation and an individual or individuals may be the only entity known to the common law which can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by its agents, and such capacity in the absence of express enactments to the contrary involves the necessary correlative liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalized it, and it must be dealt with by the Courts according to the intention of the Legislature."[18]

Further he said, that if the assumption was correct that the union was suable in tort as expressly provided by certain sections of the Acts, then the act *must* be against them in their registered name because they were acts of the association.

The first line of thought which appears in the decisions of both the lower court and the House of Lords is that, by force of the statutes, the

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cature Act to proceedings at law. And in this country many states have common interest statutes, and in the majority of the states which have such statutes they are applicable to proceedings at law. This is important for if there is such a statute, and it is applicable to proceedings at law, then, of course, it is applicable to suit against the members of a labor union.

[17][1901] A.C. 426 (H. of L.).

[18]*Id.* at 429. Lord Brampton, in agreeing with the conclusion reason by Farwell adopted the same reasoning at page 442: "I think that a legal entity was created by the Trade Union Act, 1871, but the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statutes, distinct from the unincorporated trade union, consisting of many thousand separate individuals, which no longer exist under any other name."

trade union is a legal unit with capacity for acquiring assets and incurring obligations. The second line of thought, as evidenced by Lords MacNaghten and Lindley, was that the members of the union might have been sued under the rules as to representative suits which had been given wider scope under the Judicature Acts, and that the effect of the Trade Union statutes was simply that the plaintiff might sue the members, describing them by their society name, and bring them within the jurisdiction of the court by serving only some of the members.

Lord Lindley said that he had no doubt whatever that if the trade union could not be sued in its registered name, some of its members could be sued on behalf of themselves, and the other members of the society; and that therefore, the question of whether the name of the trade union ought to be struck out of the writ was a question of comparatively small importance—a question not of substance but of mere form. He further indicates his opinion:

> "The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive."[19]

A further liberalization of the rules governing suits against unincorporated associations was made by the Supreme Court of the United States in the leading case of *United Mine Workers v. Coronado Coal Co.*[20] After taking cognizance of the common law rule as to non-suability, the Court pointed out that there had been affirmative recognition of the existence of trade unions by statutes, and other rights accorded them and that this recognition was more in accord with the procedure to meet modern needs, as justice might be impossible without such a rationalization of the problem confronting the courts. The Court further recognized that the legislation in the *Taff Vale* case did not create the trade unions but simply recognized their existence and regulated them in certain ways, but neither conferred on them the general power to sue, nor imposed liability to be sued. It was shown that the Court considered this a matter of procedure in the statement of Chief Justice Taft in the opinion:

> "As a matter of substantive law, all the members of the union engaged in a combination doing unlawful injury are liable to suit and recovery, and the only question is whether when they have voluntarily, and for the purpose of acquiring concentrated strength and the faculty of quick unit action and elasticity, created a self acting body with great funds to accomplish their purpose, they may not be sued as this

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[19] *Id.* at 445.
[20] 259 U.S. 344, 42 Sup. Ct. 570, 66 L. ed. 975 (1922).

body, and the funds they have accumulated may not be made to satisfy claims for injuries unlawfully caused in carrying out their united purpose."[21]

The trade unions, said the Court, have been recognized by various federal statutes. They have been tendered formal incorporation, lawfully recognized, given representation on various boards regulating their industry, and periodicals issued under the auspices of trade unions admitted as second class matter. Thus, the Court concluded:

> "In this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes."[22]

The *Coronado* decision followed the lead of the *Taff Vale* case and held for the first time in the federal courts that a trade union was suable in its association name. This decision seems appropriate enough in view of the activity of those unions. As the Court argued, organizations that are as real and important as trade unions ought to be held amenable for their acts and contracts. Their sphere of activity is almost unlimited. In both decisions, there are expressions to the effect that there was a question of mere form before the Courts.[23] The rationale of both cases seems to rest in the recognition of the labor unions by legislative action of some nature, and the right to sue and be sued in the association name is the result of a practical-minded court's construction of the functions of the association to determine its "entity" aspect. Writers have considered the general proposition as stated in the *Coronado* decision, that unincorporated associations may be sued, as mere dictum because the facts of the case were not sufficient to render the trade union liable. Yet it would appear that even if it be dictum, it is so clearly and firmly expressed that it will be followed by the more practical-minded courts.

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[21] *Id.* at 390, 66 L. ed. at 987.

[22] *Id.* at 391, 66 L. ed. at 987.

[23] Chief Justice Taft said at page 390: "Though such a conclusion as to the suability of trade unions is of primary importance in working out justice and in protecting individuals and society from possibility of oppression and injury in their lawful rights from the existence of such powerful entities as trade unions, it is after all in essence and principle merely a procedural matter."

Lord Lindley in the *Taff Vale* decision said: "The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceedings than that which would have to be adopted if the name could not be sued."

Cf. Lord Brampton, at page 442:

". . . I do not see how it would be possible for those common funds to be made applicable for remuneration or recompense or redress for any wrongful act done by a body of men like the society unless the society could be sued in the way in which it is proposed to sue them, and as I think it may be."

It might be inferred from the *Taff Vale* case, and other modern English decisions which support that doctrine,[24] that the statutory regulation of unincorporated associations less than that believed usually requisite to create corporations may suffice to induce the English courts to recognize them as entities. Public policy should not prevent the courts from going still further in making the law in regard to labor unions, and other unincorporated associations, accord with actual facts.

Today legislative grant is necessary to recognize the legal entity, as compared with the prerogative grant at common law.[25] Yet to acquire a charter from the state today is a much simpler process. General incorporating statutes have been enacted under which as few as three parties may petition for a charter to be granted by approval of the Secretary of State and the Governor.[26] Special legislative grants are no longer a prerequisite to recognition as a legal unit in the eyes of the law.

The exact implications and imports from the *Coronado* decision are subject to heated debates and conjecture by the various legal writers and text authors.[27] The decision has met with similar fate in the federal and state courts. Some of the federal courts have thought that the *Coronado* case established a general rule that unincorporated associations could sue and be sued as an entity.[28] But in *Moffat Tunnel League v. United States,*[29] the Supreme Court of the United States held that an unincorporated association, unless authorized by statute, had no capacity to sue to set aside an order of the Interstate Commerce Commission. Futher limitations have been placed on the effect of the decision in that the federal courts have refused to endow the unincorporated labor union with the attributes of citizenship apart and separate from its members for making out diversity of citizenship cases. The actual citizenship of its members de-

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[24]Osbourne v. Amalgamated Society of Railway Servants, [1909] 1 Ch. 163 (C.A.); General Union of Operative Carpenters and Joiners v. Ashley, [1922] 2 A.C. 440 (H. of L.).

[25]Donovan v. Danielson, 244 Mass. 432, 138 N.E. 811, 813 (1923).

[26]Miss. Const. (1890) § 178 provides that "Corporations shall be formed under general laws only."

Miss. Code Ann. (1930) § 4131 provides for the steps to be taken in securing a corporate charter. It is a general provision of which any persons meeting the requirements may take advantage. Upon the approval by Attorney General, Governor and Secretary of State, the charter becomes effective. This same section provides for the incorporation of unincorporated bodies, such as societies, institutions, fraternal organizations, etc., upon the application of three members of such organization.

[27]A controversy existed in the Harvard faculty between Professor Warren who argued for a construction holding the basis of the decision to suit under the terms of the Sherman Act and Professor Dodd who advanced the wider significance of the decision. See, Warren, Corporate Advantages Without Incorporation (1929) 648; and Dodd, *Dogma and Practice in the Law of Associations* (1929) 42 Harv. L. Rev. 997.

[28]Hansell v. Purnall, 1 F.(2d) 266 (C.C.A. 6th, 1924); Russell v. Central Labor Union, 1 F.(2d) 412 (E.D. Ill. 1924).

[29]289 U.S. 113, 53 Sup. Ct. 543, 77 L. ed. 1069 (1933).

termines the citizenship of an unincorporated labor union for purposes of federal jurisdiction.[30]

The New Federal Rules of Civil Procedure[31] have further limited the use of the case to instances in which a federal question is involved, and also provide that the Federal Courts are to look to the statements of practice in the state from which the decision comes. Moore suggests in this treatise on the subject[32] that for Rule 17(b) to be effective where diverse citizenship affords the court jurisdiction that the unincorporate labor union must be given capacity to sue or be sued, by endowing it with "citizenship" for such purposes. Such treatment, he contends, might well be accorded them and worked out along lines developed in the corporate field. The rule of the *Coronado* case and of the state procedural statutes which recognize as an entity those groups which act as legal units seems desirable.[33]

As for the state courts, the doctrine of suability of unincorporated trade unions, as enunciated by the Supreme Court in the *Coronado* case, has not been accorded favor in some of them.[34] An Arkansas case in which the Court was asked to overrule a previous state court decision, *District No. 21 United Mine Workers v. Bourland*,[35] rejected the doctrine of the *Coronado* decision. After stating that there was no federal question involved to bind or limit their opinion, it was stated:

> "We think that the reasons assigned by the learned Chief Justice for a change of the rule addressed themselves to the legislative bodies rather than the courts. In the absence of a statute on the subject, we are bound by the rule of common law, which is in no sense opposed to any public policy of the state, and which has become a part of the laws of the state. Hence, we adhere to our former opinion that an unincorporated body of men or a voluntary association of persons

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[30]Rosendale v. Phillips, 87 F.(2d) 454 (C.C.A. 2d, 1937); Ex parte Edelstein, 30 F.(2d) 636 (C.C.A. 2d, 1929); Gaunt v. Lloyds American of San Antonio, 11 F. Supp. 787 (W.D. Tenn. 1935); Russell v. Central Labor Union, 1 F.(2d) 412 (E.D. Ill. 1924). See Notes (1929) 42 HARV. L. REV. 1079, and (1933) 33 COL. L. REV. 363.

[31]*Federal Rules of Civil Procedure* (1938) § 17 (b): ". . . a partnership or unincorporated association, which has no capacity by the law of such state, may sue or be sued in its common name for purposes of enforcing for or against it a substantive right existing under the Constitution or the laws of the United States." The rule also allows to be maintained a suit which would be maintainable in the courts of the state in which the district court is held.

[32]2 MOORE, FEDERAL PRACTICE (1938) § 17.17.

[33]See Foster and Magader, *Jurisdiction Over Partnerships* (1924) 37 Harv. L. REV. 793, 796-798.

[34]District No. 21 United Mine Workers v. Bourland, 169 Ark. 796, 277 S.W. 546 (1925); Walker v. Brotherhood of Locomotive Engineers, 186 Ga. 811, 199 S.E. 146 (1938); Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, 238 Ill. App. 123 (1925); Wilson v. Airline Coal Co., 215 Iowa 855, 246 N.W. 753 (1933); Tyler v. Boot & Shoe Workers' Union, 285 Mass. 54, 188 N.E. 509 (1933); Grant v. Carpenters' District Council, 322 Pa. 62, 185 Atl. 273 (1936); West v. B. & O. RR., 103 W. Va. 417, 137 S.W. 654 (1936).

[35]169 Ark. 796, 277 S.W. 546, 549 (1925).

cannot be sued in their society name in the absence of a statute to that effect."

This type of argument and statement of the law is utilized in the other decisions. *Tyler v. Boot and Shoe Workers' Union*[36] is stronger in its advocacy of the failure of the entity concept of an unincorporated association:

> "No person or legal entity is described as defendant in the writ in the case at bar. The description of the defendant in this writ imports a voluntary unincorporated association. Such an association cannot be a party to the litigation. It has no capacity to sue or be sued in its own name alone."

Contrary to the rejection by these state courts of the *Coronado* case, there are those courts which accept the *Coronado ratio decidendi* and apply its pragmatic reasoning to reach the desired economic and social end—the suability of unincorporated associations in their own name.[37] Thus, in *Syz v. Milk Wagon Drivers' Union*,[38] the Court allowed suit against an unincorporated voluntary association issuing contracts:

> "It is true that section 1186, R.S. 1919, has been held unconstitutional, in so far as it constitute voluntary or unincorporated associations suable entities. But the defendant union, being a voluntary association having powers and privileges not possessed by individuals or partnerships, is a suable entity without the aid of said statute."

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[36]285 Mass. 54, 188 N.E. 509, 510 (1933).

[37]Operative Plasterers' and Cement Finishers' International Association v. Case, 93 F.(2d) 56 (D.C. App. 1937); Dean v. International Longshoremen's Association, 17 F. Supp. 748 (W.D. La. 1936); Gaunt v. Lloyds American of San Antonio, 11 F. Supp. 787 (W.D. Tex. 1935); Craig v. San Fernando Furniture Co., 89 Cal. App. 167, 264 Pac. 784 (1928); Thompson v. Peck, 320 Pa. 27, 181 Atl. 597 (1935) and others discussed in the text.

In other connections, the Supreme Court has treated unincorporated associations as legal entitles subject to liabilities. In Burk-Waggoner Association v. Hopkins, 269 U.S. 110, 46 Sup. Ct. 48, 70 L. ed. 183 (1925), it held that an unincorporated joint stock association, although a partnership under the state law, was subject to taxation as a corporation under the Revenue Act of 1918. In Hemphill v. Orloff, 277 U.S. 537, 48 Sup. Ct. 577, 72 L. ed. 978 (1927), it was held that a business association which was unincorporated but has some of the attributes of a corporation under the state law, could not claim certain rights, privileges and immunities to associates as individual citizens. Discussing the matter, the Court said at page 579: "Whether a given association is called a corporation, partnership, or a trust, is not an essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment."

In Weiss v. Stearn, 265 U.S. 242, 44 Sup. Ct. 490, 68 L. ed. 1001 (1922), Justice McReynolds in delivering the opinion of the Court said at page 1005: "Questions of taxation must be determined by viewing what was actually done, rather than the declared purpose of the participants; and when applying the provisions of the 16th Amendment, and income laws enacted thereunder, we must regard matters of substance, and not mere form." It is obvious that in these decisions that actuality of the situation rather than the technical distinction between incorporated bodies and voluntary associations was the controlling consideration.

[38]24 S.W.(2d) 1080 (Mo. App. 1930).

This case appears to be significant in that it inferentially announces the principle that statutory recognition is not altogether necessary to allow suits against the association itself. With the application of economic and social facts, the Court has reasoned that an unincorporated association is distinct from those individuals who compose it, by reason of the powers and privileges that it possesses in addition to those which its constituents possesses.

Bruns v. Milk Wagon Drivers' Union[39] appears to bring forth a new principle of recognition of unincorporated association by the legislatures. In allowing suit, the Court said:

> "Defendant also makes the point it appears for the first time in this court, that the defendant, being a voluntary unincorporated labor union, was not capable of suing or being sued under the laws of this state. But our statute, section 1186, R.S. 1919, provides how writs may be served upon voluntary or unincorporated associations, and such an organization as this is a legal entity, and entitled to sue and be sued the same as corporations."[40]

Vigorously approving the *Coronado* decision is *Operative Plasterers' and Cement Finishers' International Ass'n. v. Case.*[41] Here full faith and credit was given to a North Carolina judgment which was attacked on the ground that the plaintiff was an unincorporated association without power to institute proceedings and proceed to judgment. In answering the challenge of lack of due process, the court stated succiently that there is no greater problem in allowing suit against the common fund of an unincorporated association as an entity than there is allowing a suit to lie against a corporation as such. The corporate entity and the unincorporated association "entity for purpose of suit" were both fictions of the law. As such, the matter, as they considered it, was procedural because there was not intended change of any substantive rights. The Court concluded its analysis by saying:

> "What the courts are really saying in such cases as United Mine Workers v. Coronado Coal Co and Jardine v. Superior Court is that inasmuch as a fictional entity has been recognized for the purpose of benefiting and protecting unincorporated associations in both the substantive and adjective sense, as by giving protection against embezzlement of funds, by giving rights to appear in statutory arbitrations, and before official boards, and more recently, by giving rights to represent workers in collective bargaining, National Labor Relations Act. 29 U.S.C.A. Sec. 151-166, 49 Stat. 449-457, so also the fictional entity

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[39]242 S.W. 419, 421 (Mo. App. 1922).

[40]Miss. Code Ann. (1930) § 2979 is similar to the type of statute referred to in this case: "All persons, firms, copartnerships, or corporations carrying on business in the state of Mississippi, by or through trustees or attorneys in fact, may be served with process upon an agent in all suits or proceedings in any court, by serving a copy of such process upon an agent of such trustees, or attorneys in fact, in the same manner as is now provided for service of process upon foreign corporations."

[41]93 F.(2d) 56 (D.C. App. 1937).

must in common fairness be recognized for the protection of those dealing with such associations and claiming that in such dealing their legal rights have been violated."[42]

That last dictum seems to strengthen the position of the Supreme Court in that greater and more affirmative recognition has been accorded the labor union in the National Labor Relations Act which confers on the union the right to appoint for itself a representative in the collective bargaining agreements. This, along with other federal legislative recognition, should strengthen the advocates of this policy and convert others.

A final concept which allows unincorporated associations to be sued in their association name, notwithstanding failure of the legislatures to recognize them as entities, is the theory of estoppel. In *Clark v. Grand Lodge of Brotherhood of Railroad Trainmen*,[44] the Court declared:

"We think also that the doctrine of estoppel might be applied to a case like this. This association, having over one hundred thousand, with regularly constituted officers, and a perfect working organization, has the appearance, form and method of doing business of a corporation of a legal entity. It has chosen a name and does business as a legal entity under and by the use of that name. It holds itself out as capable of contracting in that name, and by that name does enter into insurance contracts, and in that name collects premiums and accumulates funds to meet such contract obligations. When sue on such contracts in the name which it used in making the same, it ought not be allowed to say that it is a mere myth—an intangible nonentity incapable of being sued. . . In 5 C.J. 1336, this is said: 'One who deals with an association as a legal entity capable of transacting business, and in consequence receives money from it or other things of value, is estopped from denying legality of its existence. Petty v. Brunswick, etc. RR. Co., 109 Ga. 666, 35 S.E. 82'."[45]

These cases along with others declaring voluntary unincorporated trade unions subject to suit in their own name represent a trend toward the Civil Law concept that associations are legal entities existing separate and distinct from its members.[46]

Whether the rejection by some courts of the *Coronado* case is to be looked upon as a final determination or not—whether it means a continued refusal to recognize associations as entities distinct from their constituents,

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[42]*Id.* at 64.

[43]*E.g.*, Norris-LaGuardia Act, 47 STAT. §§ 70-73 (1932), 29 U.S.C.A. (1942 §§ 101-115.

[44]328 Mo. 1084, 43 S.W.(2d) 404, 413 (1931).

[45]*Cf.* Taylor v. Aldridge, 180 Miss. 635, 178 So. 331 (1938), (1939) 11 MISSISSIPPI LAW JOURNAL 325, where the Court held that if a person holds himself out as doing business in a corporate name, he is estopped to deny the corporate existence of the business and liability arising out of such corporate transactions. This reasoning would lead to the belief that if an unincorporated labor union were accepting the corporate benefits and its structure in business and further held itself out on that basis, then liability should accrue and the corporation should be suable as a corporate entity.

[46]Succession of Pilcher, 39 La. Ann. 362, 1 So. 929 (1887).

or nothing more than a reluctance to adopt a new procedural device—can be best determined by looking to see what alternative methods of suit or of reaching the desired result have been found to exist in those states which reject the decision. For out of the important class suit doctrine have been modeled or developed many of the more specialized methods which are set up in the statutes of many states.

These statutes, varying in breadth and scope, regard the unincorporated associations for purposes of suit and other intent as legal entities. Such statutes have been categorized, and correctly so, into three types of classifications:[47] (1) statutes permitting some to sue or be sued for themselves and others;[48] (2) statutes which allow an officer for the time being to be the nominal plaintiff or defendant, and which provide that he shall be taken to represent all those legal units which would have been necessary parties if no such statute had been passed;[49] and (3) statutes which allow the association named to be used in naming the party or parties plaintiff or defendant.[50]

From the number and effect of these statutes, it appears sufficiently safe to say that the trend today is to recognize the associations for purposes of suit, with special emphasis being placed on the suits under the state statutes recognizing the labor union as a legal entity.

C. *The Mississippi View*

The holding of the principal case in Mississippi on the suability *vel non* of unincorporated labor unions, *Varnado v. Whitney*,[51] represents a significant application of the rule as provided in the *Coronado* decision. In this case the plaintiff sued to recover for an alleged libelous publication, and sought to attach the property of the labor union under Section 173, Code of 1930. The Brotherhood was indebted to the defendant in the case, and the plaintiff sought to subject this indebtedness to the payment of the plaintiff's demand against the defendant. The Brotherhood, an unincorporated labor union operating throughout the United States on a lodge system of representative government, had a subordinate lodge located in Jackson, Mississippi. Process was served on the secretary of the lodge of which the defendant was a member.

After announcing the common law rule, the Court said:

> "In many, if not all, respects this brotherhood is an association of the kind and character of the United Mine Workers of America, which was held suable in its own name by the Supreme Court of the

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[47]For classification, see, Cole, *The Civil Suability at Law of Labor Unions* (1939) 8 Ford. L. Rev. 29; and also, for a similar classification, see Warren, Corporate Advantages Without Incorporation (1929) 542.

[48]Ala. Code (1923) § 5701; and Ark. Dig. (Crawford & Moses) (1921) § 1098.

[49]Ga. Code (1926) § 1992; Mo. Rev. Stat. (1919) § 13268.

[50]Ala. Code (1923) §§ 5723 *et seq.*

[51]166 Miss. 663, 147 So. 479 (1933).

> United States in United Mine Workers v. Coronado Coal Co., for the reason that federal statutes, which recognize the legal entity of such associations, grant them rights, and impose liabilities on them, impliedly authorize them to sue and be sued in their association names. All that was there said is applicable here, and in addition, thereto, such right and liability are necessarily implied by Sections 5231 to 5268, Code 1930."[52]

The Court found legal recognition of such associations and authorization to operate in the state under the Code provisions. Permission is also granted to incorporate, but this provision is not mandatory. After stating that various rights are given and liabilities imposed on such associations, the Court stated what appears to be the *ratio decidendi* of the decision:

> "It may be true that the main purpose of these sections is to bring these associations issuing benefit certificates to its members under the supervision of the State Insurance Department and to regulate the issuance and payment of these certificates. But to stop there would not be sufficient protection for them, for the integrity of their benefit certificates can only be maintained when the courts are open to them for the preservation of many other of their rights and duties auxiliary to the issuance of such certificates. Without such rights they cannot function with any degree of safety. Their suability is essential, not only for the protection of their obligation, but to adequately protect their activities and existence."[53]

This exposition of the law as to the suability of unincorporated trade unions in Mississippi appears to be far reaching for several reasons. First, it accepts the doctrine of the *Coronado* case, which has been rejected in some state courts. Secondly, it goes beyond the point to which some legal writers limit the effect and intent of the *Coronado* decision, namely, suits brought under the Sherman Act. And thirdly, it establishes what appears to be a doctrine of unlimited suability without any further legislation of the type previously discussed[54] especially recognizing the association as a legal entity.

Justice Smith has assumed this position for the Court in an opinion which is clear, concise and unambiguous in its terms. From the statement "Their suability is essential, not only for the enforcement of their obligations, but to adequately protect their activities and existence," one is justified in stating that the Mississippi Supreme Court has taken an unprecedented stand.

The decision seems to be based on the protection of the trade unions as well as the protection of those individuals who deal with it as an unit and the public who generally consider them as an unit distinct and separate from its composite of individuals. The disregard of the fictional basis of

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[52]*Id.* at 669, 147 So. at 480.
[53]*Id.* at 670, 147 So. at 480.
[54]For previous discussion of the statutes, see *supra* at page 147.

the common law rule is tossed aside, as a practical court views the basis of the decision from economic and social ends.[55]

One year after the rendition of the *Varnado* Case, the Court was confronted with a suit similar in most respects, varying in that it was an action at law on a contract. In *Brotherhood of Railroad Trainmen v. Agnew*,[56] the Court allowed suit against the unincorporated labor union and allowed service of process to issue on the secretary of the subordinate lodge in Hinds county. The union had failed to appoint an attorney in the state as required by the statutes.

In reaching the decision the Court cited the *Varnado* decision and said:

> "In Varnado v. Whitney, . . . we held that appellant association is suable in this state, by force of our statutes applicable to such associations; and by the rule, supported by ample general course of authority, is that when an unincorporated association, suable as such under the statute, is engaged in the business in the state wherein suit is brought, and there is an absence or failure of any specific statutory method of service of process on the association, the courts will treat such an association as a *quasi-corporation* for the purposes of process, and will accept service of process upon an agent or representative of the association whose character in relations to the association is such that it could be reasonably expected that he would give notice of the suit to his association."[57]

This decision appears to extend the doctrine of the *Varnado* case in at least one respect. The suit in the *Varnado* decision was one instituted in equity under Section 173, Code of 1930, which is an attachment proceeding against non-resident's property, whereas, although the action in the *Agnew* case was brought in the law court, similar recognition of the entity of the association was accorded the unincorporated union at law.

Thus, it appears, that neither the jurisdiction of the suit whether in law or in equity, nor the purpose of the suit can prevent suit in the association name because in Mississippi a trade union is an entity for purposes of suit.

RICHARD E. STRATTON, III

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[55]For this approach to the law, see Smith, *The State and the Social Process* (1936) 9 MISSISSIPPI LAW JOURNAL 147.

[56]170 Miss. 604, 155 So. 205 (1934).

[57]*Id.* at 612, 155 So. at 207.

THE POWER OF AN EQUITY COURT IN MISSISSIPPI TO DISSOLVE A CORPORATION

I. *The General Rule*

A corporation is a creature of the state and for its existence is dependent upon the state.[1] Forfeiture of the franchise of a corporation may be secured through a *quo warranto* proceeding or other remedy designated by statute, but it is usually held that there is no inherent jurisdiction in the equity court to dissolve a corporation at the suit of the state.[2] Because of the limited nature of equity's jurisdiction and because a corporation owes its life to the sovereign grant of a franchise, the remedy to be sought for its dissolution is in the law court.[3] The majority of the courts adhere to this doctrine restricting the power of equity over corporations in the absence of statutory provisions.[4]

It is only in comparatively few of the cases concerning dissolution of a corporation that the question of equity's jurisdiction over such matters will arise. The state has its remedy by a *quo warranto* proceeding instituted in its own behalf; the stockholders may agree to liquidate the assets of the company and distribute the proceeds among themselves. The difficulties arise when there is disagreement among the shareholders and a winding up of the affairs is sought. If the corporation has ceased to be a going concern, the majority of the stockholders may insist on a winding up. If it is still a going concern, the power of the majority to insist upon a sale of the assets depends upon the statutes of the state and the terms of the charter; in the absence of such provisions there is no such authority.[5]

The minority stockholders of a corporation have assented to majority rule and are bound by that rule when it is properly and impartially exer-

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[1]19 C. J. S. (1940) 1420, § 1649.

[2]"A court of chancery by virtue of its general equity powers, in the absence of express statutory authority, is not authorized to dissolve a corporation, or distribute the assets of a corporation, which is pursuing its ordinary business, so as to effect a practical and actual dissolution of the corporation." Hardon v. Newton, Fed. Cas. No. 6054 at 501 (C.C.D. Calif. 1870); Taylor v. Decatur Mineral & Land Co., 112 Fed. 449 (C.C.N.D. Ala. 1901) *aff'd.* 115 Fed. 1022 (C.C.A. 5th, 1902); Conklin v. United States Shipbuilding Co., 140 Fed. 210 (C.C.D.N.J. 1905); Lyon v. McKeefrey, 171 Fed. 384 (C.C.A. 3rd, 1909); Davis v. Randall, 117 Cal. 12, 48 Pac. 906 (1897); Bixler v. Sumerfield, 195 Ill. 147, 62 N.E. 849 (1902); Supreme Sitting of the Order of Iron Hall v. Baker, 134 Ind. 293, 33 N.E. 1128, 50 L.R.A. 210 (1893); Barton v. International Fraternal Alliance, 85 Md. 14, 36 Atl. 658 (1897); Attorney-General v. Tudor Ice Co., 104 Mass. 239, 6 Am. Rep. 227 (1870); 16 FLETCHER, CORPORATIONS (Rev. ed. 1933) § 8098.

[3]STEVENS, CORPORATIONS (1936) 805.

[4]Note (1933) 19 IOWA L. REV. 95, 97; Steenrood v. L. M. Gross Co., 334 Ill. 362, 166 N.E. 82 (1929).

Power to dissolve a corporation was denied the equity court in New York in Attorney-General v. Bank of Niagara, 1 Hopk. 354, 2 N. Y. Ch. Rep. 448 (1825). It was later conferred upon that court by statute and held in Attorney-General v. Bank of Chenango, 1 Hopk. 596, 2 N. Y. Ch. Rep. 536 (1826), to exist only because of that statute.

[5]STEVENS, CORPORATIONS (1936) 215-16, 490.

cised. They are also first bound to apply to the majority for relief when they are aggrieved at corporate action. Between these minority and majority stockholders there exists a trust relation, as is the relation of the officers to the stockholders, and such relation, being fiduciary in nature, may be the basis of equitable jurisdiction.[6]

The early doctrine was no doubt that equity had no jurisdiction to decree the dissolution of a corporation at the suit of minority stockholders.[7] In the modification of this rule the distinction developed between the power to wind up a corporation and distribute its assets and the right to decree a strict dissolution. The technical distinction between the legal dissolution of a corporation by the extinguishment of its franchises and a mere cessation of its business and distribution of assets[8] is that in the former case the corporation is wholly destroyed in contemplation of law while in the latter case it does not necessarily cease to exist.[9] Some courts refuse to recognize this distinction and hold that equity has no power to wind up the affairs of a corporation and thus do indirectly what it can not do directly.[10] However, many courts today hold that equity is vested with this power of liquidation—the power to wind up the affairs and to distribute the assets of a corporation.

The modification of the early doctrine which now permits a suit in equity to be brought by the shareholders is supported by ample authority.[11] However, the courts generally speak of this recognition of equity's power as an exception to the general rule[12] and often refer to equity's power to decree a *de facto* dissolution or winding up of the corporation's business and distribution of its assets as contrasted with equity's lack of power to decree a *de jure dissolution*.[13]

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[6] 4 POMEROY, EQUITY JURISPRUDENCE (5th ed. 1941) § 1088.

[7] "This rule had its origin at a time when corporations were created by special charters the grants of which conferred valuable and exclusive franchises upon their grantees, and it was considered that, as the franchises were granted by the state, they could be vacated or forfeited only in a proceeding by the state. . . ." Goodwin v. Milwaukee Lithographing Co., 171 Wis. 351, 353, 177 N.W. 618, 621 (1920).

[8] Note (1929) 15 VA. L. REV. 395, 401.

[9] 1 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 282.

[10] French v. Gifford, 30 Iowa 148 (1870).

[11] Tower Hill-Connellsville Coke Co. of W. Va. v. Piedmont Coal Co., 64 F. (2d) 817, 91 A.L.R. 648 (C.C.A. 4th, 1933); Tri-City Electric Service Co. v. Jarvis, 206 Ind. 5, 185 N.E. 136 (1933); Flemming v. Heffner & Flemming, 263 Mich. 561, 248 N.W. 900 (1933); Nashville Packet Co. v. Neville, 144 Tenn. 698, 235 S.W. 64 (1921); 19 IOWA L. REV. 95, (1934) 28 ILL. L. REV. 847, (1926) 43 A.L.R. 242, (1929) 61 A.L.R. 1212, (1934) 91 A.L.R. 665.

[12] Note (1929) 15 VA. L. REV. 395, 400.

[13] "Defendant insists that a corporation can only be dissolved upon suit of the state or by following certain statutory procedure. This is doubtless true when it is sought to accomplish a *de jure* dissolution. A *de facto* dissolution or winding up of a corporation's business and distribution of its assets may, however, be effected through the chancery court in other suits." Nashville Packet Co. v. Neville, 144 Tenn. 698, 235 S.W. 64, 66 (1921); O'Connor v. Knoxville Hotel Co., 93 Tenn. 708, 28 S.W. 308 (1894).

The courts which recognize this exceptional power of the equity court have usually imposed fairly close restrictions upon its application. This power on the part of equity is still often referred to as a drastic procedure[14] to be used in a cautious manner.[15] These courts which apply it must find one of three exceptional situations present as a basis for the jurisdiction.

(1). Where Fraud Is Charged

Some courts, still adhering to a strict rule that equity has no power to wind up the affairs of a corporation in the absence of statutory authority, will not even permit equity's interference when fraud and mismanagement are charged.[16] On the other hand, many equity courts, while recognizing the general rules, assert as a basis for interference, gross mismanagement, positive misconduct, or other grounds showing a breach of trust on the part of the officers of the corporation.[17] Under these conditions, an equity court may interfere, independently of statute, appoint a receiver, and through him take possession of the property of the corporation to administer its affairs, enjoin interference by its officers, and wind up the affairs.[18]

The case of *Miner v. Belle Isle Ice Co.*[19] sustains the power of a court of equity to appoint a receiver of a corporation at the instance of the stockholder. This power is recognized as an exception to the general rule.[20]

In the case of *Cantwell v. Columbia Lead Co.*,[21] where the court sustained the power of equity to appoint a receiver for a corporation at the instance of a stockholder, on the ground of fraud in the management, the court said:

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[14]Note (1933) Iowa L. Rev. 95, 99, 100.

[15](1934) 28 Ill. L. Rev. 837, 839.

[16]Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N.W. 217, 38 L.R.A. 122, 63 Am. St. Rep. 389 (1897); State v. Foster, 225 Mo. 171, 125 S.W. 184 (1909); Furrer v. Nebraska Building & Investment Co., 108 Neb. 689, 189 N.W. 359 (1922); South Norfolk Land Co. v. Tebault, 124 Va. 667, 98 S.E. 679 (1919).

[17]"It seems well settled that, if the agents of the corporation, in whom the authority to control its affairs is vested, are themselves guilty of wrong against the corporation either by personal conversion of its funds, or, being interested in another corporation or business, fraudulently manage the affairs of the corporation to its detriment, and for the benefit of such other corporation or concern, a court of equity will, upon proper bill filed, interfere at the suit of a stockholder to protect his interest in the corporation. . . ." Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 32 N.E. 420, 422, 17 L.R.A. 818 (1892).

[18]Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 Atl. 720 (1910); First National Bank v. Fireproof S. B. Co., 199 Iowa 1285, 202 N.W. 14 (1925); Hawkins v. Foasberg, 178 Minn. 457, 227 N.W. 655 (1929); Green v. National Adv. Co., 137 Minn. 65, 162 N.W. 1065 (1917).

[19]93 Mich. 97, 53 N.W. 218, 17 L.R.A. 412 (1892). In this case there were fraudulent acts on the part of the officers of the corporation who were using the stock of the corporation for their own benefit and to the injury of the minority stockholders.

[20]Also recognizing this exception is Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499 (1892).

[21]199 Mo. 1, 97 S.W. 167 (1906).

". . . this court has never denied power in a chancellor to prevent a scheme of irreparable injury and wrong, merely because the movers in that scheme speak and act in a corporate capacity rather than in an individual capacity. That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are 'frozen out', that business immortality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis. The board of directors of a corporation are but trustees of an estate for all the stockholders, and may not only be amenable to the law, personally, for a breach of trust, but their corporate power, under color of office, to effectuate a contemplated wrong, may be taken from them when, by fraud, conspiracy, or covinous conduct, or extreme mismanagement, the rights of minority stockholders are put in peril, and the underlying, original, corporate entente cordiale is unfairly destroyed. It would be a sad commentary on the law, if, when the trustee of a corporate estate is making an improper disposition of it, or has shown improper partiality towards one of its conflicting parties, or has put the estate in a fix it is liable and likely to be either wasted or destroyed, or mercilessly taken from all and given to a part, a court could not reach out its arm and preserve and administer the estate.[22]

The basis of equity's jurisdiction to intervene in cases of this kind is the fraud or mismanagement, and mere differences between the majority and minority stockholders will not be sufficient.[23] Equity will protect the interests of the minority if their rights are being impaired by a combination of the majority stockholders to divert the profits for their own use,[24] and it may intervene where the stockholders are evenly divided.[25] However, no remedy will exist when the majority are conducting the business in good faith, exercising their best judgment, even if the minority stockholders are dissatisfied.[26] It must be remembered that dissolution is a drastic remedy[27] and will not be applied if there is any other adequate form of relief.[28]

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[22]199 Mo. 1, 97 S.W. 167, 179 (1906).

[23]Platner v. Kirby, 138 Iowa 269, 115 N.W. 1032 (1908); 8 FLETCHER, CORPORATIONS (Rev. ed. 1933) § 8080.

[24]Fougery v. Cord, 24 N. J. Ch. 185, 24 Atl. 499 (1892); Ames v. Goldfield Merger Mines Co., 227 Fed. 292 (W.D. Wash. 1915).

[25]Note (1933) 19 IOWA L. REV. 95, 98; STEVENS, CORPORATIONS (1936) 806. The writers usually state this ground as an exception but actual cases involving this situation are seldom cited.

[26]Becker v. Home Brewery Co., 77 Ind. App. 629, 135 N.E. 847 (1922); Beeler v. Standard Investment Co., 107 Wash. 442, 181 Pac. 896 (1919). *See* BALLANTINE, PRIVATE CORPORATION (1927) § 253.

[27]In Commonwealth v. Newport, Licking & Alexandria Turnpike Co., 29 Ky. L. Rep. 1285, 97 S.W. 375 (1906), the court, referring to dissolution, said that the penalty invoked represented the extreme rigor of the law and that its inflection must rest upon grave cause.

[28]French v. Gifford, 30 IOWA 148 (1870); 16 FLETCHER, CORPORATIONS (Rev. ed. 1933) § 8043.

(2). Where a Corporation Is No Longer a Going Concern

The duty is imposed upon the directors of a corporation to put the operations of the company to an end and to wind up the affairs when the failure of the company becomes inevitable. If this duty is neglected, any shareholder who feels aggrieved should be entitled to the assistance of the courts; and a decree should be made ordering the directors to wind up the company's business and distribute the assets among those who are equitably entitled to have them.[29]

In the case of *Nobel v. Gadsden Land and Improvement Co.*, [30] the court pointed out that when a corporation had been abandoned by stockholders and officers, minority stockholders may invoke the aid of the equity court to rescue the trust fund and to distribute the assets. The question of distribution of assets arose also in the Alabama case of *Mobile Temperance Hall Ass'n v. Holmes*.[31] The court said:

> "This court has also held that, although there has been no legal dissolution, yet when it is made to appear that the corporation has failed in its object and purpose, and it appears a continuation of a profitable business cannot be had, a court of equity will administer the assets at suit of stockholders. . . ."[32]

The insolvency of the corporation may be sufficient grounds for vesting jurisdiction in the equity court to decree a distribution of assets.[33] But if the basis of that jurisdiction is the financial status of the company, failure must be inevitable, not merely possible or probable.[34] Relief by equity may also be extended where by sale of the property, the functions of the corporation have ceased and the managers have retained the funds.[35] Likewise, the remedy may be available where the property of the corporation has been abandoned.[36] And abandonment may be implied from a failure to hold meetings for a protracted period.[37]

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[29] 1 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 284.

[30] 133 Ala. 250, 31 So. 856, 91 Am. St. Rep. 27 (1902).

[31] 189 Ala. 271, 65 So. 1020 (1914).

[32] 189 Ala. 271, 65 So. 1020, 1023 (1914).

[33] Porter v. Industrial Information Co., 5 Misc. 262, 26 N. Y. Supp. 328 (Sup. Ct. 1893).

[34] ". . . so long as the corporation is a going concern, so long as it possesses the means and ability to pursue one or more of its primary purposes or lines of business; and so long as the conditions exhibited do not demonstrate to a moral certainty that its continuation must by inevitable necessity result in serious loss in the near future, and in complete ruin sooner or later a court of equity will not and should not deprive the majority stockholders of their right to carry on their business under their chosen management however speculative and uncertain its prospects may seem to a disapproving and dissentient minority." Phinzy v. Anniston City Land Co., 195 Ala. 656, 658, 71 So. 469, 471 (1916); Radford West End Land Co. v. Cowan, 101 Va. 632, 44 S.E. 753 (1903).

[35] Cramer v. Bird, L. R. 6 Eq. 143 (Rolls Ct. 1868).

[36] Mobile Temperance Hall Ass'n. v. Holmes, 189 Ala. 271, 65 So. 1020 (1914); Baker v. La. Portable R. R., 34 La. Ann. 745, 41 La. 499 (1882).

[37] 1 BACON, BENEFIT SOCIETIES AND LIFE INSURANCE § 57.

(3). Where the Purpose of the Corporation Can No Longer Be Accomplished

The third exception provides that equity may wind up the affairs of a corporation and distribute its assets at the suit of minority stockholders when the purpose for which the corporation was organized becomes impossible of attainment. When a corporation has failed in the purposes and objects of its creation and those objectives can no longer be accomplished, a minority stockholder may apply to equity for a distribution of assets without regard to the solvency or insolvency of the corporation.[38]

It is the duty of the officers of the corporation to carry out the purposes for which the corporation was created. If that is impossible, then it is the duty of the agents to wind up the affairs of the company. Upon failure of the officers to carry out this duty, then at the suit of any minority stockholder, an equity court may compel the directors to wind up the affairs, order the assets sold and distribution of the proceeds made.[39]

Thus, the courts have recognized the power of equity courts to wind up the affairs of a corporation at the instance of minority stockholders when fraud is charged, when the corporation is no longer a going concern, or when the purpose for which the corporation was organized can no longer be accomplished. These are the recognized exceptions to the general rule that, in the absence of statutory authority, equity has no power to wind up the affairs of a corporation and to distribute the assets.

II. *The Mississippi Decisions*

(1). Early Cases

The case of *Bayless v. Orne*[40] was the first one in Mississippi to deal with the power of an equity court over a corporation, and the principles announced were new in the state. In that case a bill was filed by three of the stockholders of the company against the president and the cashier, whom the bill alleges were incompetent and unfit persons to have charge of the affairs of the company. The injunction prayed for was granted by the lower court but dissolved on appeal. Chancellor Buckner, of the Superior Court of Mississippi, announced the well settled principle that a charter can not be taken away by a collateral proceeding, but may be attacked only in a direct proceeding through the usual forms of a *scire facias*, or information in the nature of *quo warranto,* regularly prosecuted in a court of law. The Court said:

> "That a court of equity, as such, has no jurisdiction or power over corporate bodies, for the purpose of restraining their operations

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[38]Ross v. American Bana Co., 150 Ala. 268, 43 So. 817 (1907); Jones v. Henderson, 210 Ala. 614, 98 So. 878 (1924).

[39]Central Land Co. v. Sullivan, 152 Ala. 360, 44 So. 644, 15 Ann. Cas. 420 (1907); Benedict v. Columbus Construction Co., 49 N. J. Eq. 23, 23 Atl. 485 (1892).

[40]1 Free. Ch. 161 (Miss. 1840).

> or winding up their concerns, is . . . well settled by the various authorities.[41]

A few years after the Bayless case, the Supreme Court of Mississippi announced that an inquiry into a violation of the charter of a corporation can only be made by a direct proceeding, which is instituted for that purpose by the government.[42] Again, in the case of *Bohannon v. Binns,*[43] the Court held that the lower court committed no error in instructing the jury that unless a dissolution of the corporation had been judicially declared by a proceding under a *quo warranto,* there was and could be no dissolution.[44]

Thus, the early Mississippi decisions announced the well established general rules and the question of exceptions to those rules did not come up before the Court. However, in 1908, the question of equity's power to appoint a receiver was involved in the case of *Benjamin v. Staples.*[45] There the Court held that the fraudulent mismanagement of the directors and the insolvency of the bank justified the appointment of a receiver to take charge of the affairs at the suit of the creditors of the company.

The power of the equity court over a corporation was again challenged in the case of *Jackson Loan & Trust Co. v. State,*[46] which involved equity's power to enjoin a corporation and to appoint a receiver. The defendant company induced the public generally to believe that all purchasers of what it styled its "investment, home purchasing contract" would receive loans from the company upon easy terms with which to purchase homes. This proposition, which was similar to the recent dime chain-letter scheme, was announced by means of attractively-worded literature and it was utterly impossible for the company to comply with its promise. The chancery court enjoined the defendant from further prosecuting its business and also appointed a receiver. On appeal, it was held that the chancery court properly granted the injunction but improperly appointed the receiver.

In holding that the lower court committed no error in granting the injunction, the Court said:

> "It being impossible for the company to make loans to all purchasers of its contracts, its promise so to do evidences an intention to defraud, and consequently the whole course of its business constitutes such a systematic violation and abuse of the rights and privileges conferred upon it by its charter as to justify either the revocation of its

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[41] *Id.* at 173.
[42] The Grand Gulf Bank v. Archer, 7 Sm. & M. 151 (Miss. 1847).
[43] 31 Miss. 355 (1856). This was a case in the circuit court but the question of whether or not the corporation had been dissolved was material.
[44] *Id.* at 356.
[45] 93 Miss. 507, 47 So. 425 (1907).
[46] 101 Miss. 440, 56 So. 293 (1911).

charter, or the issuance of a writ of injunction, enjoining the further prosecution of such business."[47]

Thus, it was held that an equity court, where there was fraud involved, could enjoin a corporation from further prosecution of its business in a suit brought by the state.[48] There was also a holding that the equity court could not appoint a receiver for the corporation until there had been a judgment of forfeiture and ouster.[49] This case which was brought on behalf of the state apparently did not overrule the case of *Benjamin v. Staples*,[50] which was brought by creditors of the company. The *Benjamin* case, holding that equity was justified because of fraudulent mismanagement of the directors and the insolvency of the company to appoint a receiver, was again approved by the Supreme Court in the case of *Brent v. Brister Sawmill Co.*,[51] which was decided one year after the *Jackson Loan & Trust Co.* case.

(2). The Brent Case

The case of *Brent v. Brister Sawmill Co.*[52] is probably the most important one in Mississippi which has involved equity's power over the dissolution of a corporation. The question in that case was whether or not an equity court could appoint a receiver for a solvent corporation and wind up its affairs at the instance of minority stockholders. The bill charged that the liabilities of the corporation had increased while the assets had decreased, that the officers had failed to give information concerning the affairs of the company, that the majority stockholders had refused to have the books audited, that the president had been furthering his private interests, that the management had been poor; the prayer was for the appointment of a receiver.

In the opinion in this case, the Court pointed out that the powers of equity had been enlarged and that time had changed the general rule which provided that, in the absence of statutory authority, an equity court had no jurisdiction at the suit of a stockholder to wind up the affairs of a solvent corporation or to appoint a receiver therefor. It was stated as "settled" that, where there is an absence of a statute on the subject, an equity court, at the instance of a creditor, has the jurisdiction to appoint a receiver be-

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[47]*Id.* at 454, 56 So. at 295.

[48]There is no indication in the opinion as to why this case was brought in the chancery court. It would seem that the wrong remedy was sought and that *quo warranto* would have been sufficient. *See* Judge Anderson's dissenting opinion, *id.* at 454, 56 So. at 295.

[49]Concerning the appointment of a receiver, the Court held: "The court did err, however, in appointing a receiver; for, unless there is a statute so providing, the court, in proceedings of this character, is without power to appoint a receiver or trustee to wind up the affairs of a corporation. . . . Section 4029 of the Code of 1906 provides for the appointment of such a trustee, but only after judgment of forfeiture and ouster." 101 Miss. 440, 454, 56 So. 293, 295 (1911).

[50]93 Miss. 509, 47 So. 425 (1907), cited *supra* note 45.

[51]103 Miss. 876, 60 So. 1018 (1912).

[52]*Ibid.*

cause of fraudulent mismanagement of the directors of the corporation.[53] Then, the court further pointed out that there seemed to be no reason why it should not also be settled that a court of equity, when there had been gross mismanagement of affairs and misapplication of property, upon application of creditors or minority stockholders might appoint a receiver and wind up the affairs of the corporation. This should be done to protect the interests of such stockholders or creditors and to preserve the assets of the business which is being injuriously affected. The Court announced:

> "Therefore, in the present case we decide that the chancery court has the jurisdiction to appoint a receiver at the instance of the minority stockholders, to take charge of the business of the corporation, and if it is shown to the court to be necessary, to wind up such business.[54]

(3). Statutes and Recent Cases

It was after the decision in the *Brent* case that the Mississippi statutes concerning equity's power over corporations were passed.[55] Code section 4170[56] provides the manner in which the shareholders may, by two-thirds vote of the stock, apply to equity for appointment of a receiver and later for a decree of dissolution. Section 4173[57] gives the power of liquidation to

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[53]Reference was made by the Court to the case of Benjamin v. Staples, 93 Miss. 507, 47 So. 425 (1907), discussed *supra* page 156.

[54]103 Miss. 876, 896, 60 So. 1018, 1022 (1912).

"It is certainly the duty of the officers and directors of a company to conduct its affairs so as to carry out the purposes of its organization to succeed in the business enterprise in hand, to preserve its property, and to recognize and protect the rights and claims of all parties in interest. If they fail in doing this, it is then their duty to bring the affairs of the company to a conclusion. The majority of the directors and the stockholders should see that this is done. Now, if in the face of the failure of the management to do its duty, and of the failure of the purposes of organization, and of apparent loss to the company and ultimate insolvency, the majority refuses to wind up the affairs of the company, then should not the rights of the minority stockholders be protected by the law? And if so, is not equity the proper court to extend such protection? We fully understand that everything possible should be done by the minority to get a recognition of their rights and preservation of their interests within the corporation; but, when it has been shown that this has been done, then it should not be said they are without any means of relief, and that they are required in the administration of the law, to stand idly by and see the property in which they are interested wasted and lost and the business enterprise wrecked." *Id.* at 891, 60 So. at 1021.

[55]Miss. Code Ann. (1930) §§ 4170-4174.

[56]Miss. Code Ann. (1930) § 4170. This section provides the method by which the stockholders may surrender the charter of the corporation in which they hold stock. After a meeting is called for the purpose of dissolution and at least two-thirds of the stock votes for that dissolution either in person or by proxy, a petition shall be filed in the chancery court and upon hearing the court may have receivers appointed and later, upon hearing the report of the receivers, may decree the dissolution of the corporation.

[57]Miss. Code Ann. (1930) § 4173 provides: "When any corporation owning property in and doing business in this state, whether domestic or foreign, becomes insolvent or ceases to be a going concern, or while insolvent sells its franchises in whole or in part, any creditor thereof or stockholder therein may file a bill in the chancery court of this state having jurisdiction thereof, on his own behalf or on behalf of himself and all other creditors and stockholders, on behalf of himself, if a stockholder, and all other stockholders and creditors, and have its affairs, by decree

equity courts, and section 4174[58] vests full jurisdiction in equity to appoint a receiver.

The first of the two cases dealing with equity's power over corporations decided since these statutes was *Woodville Lodge, Grand United Order of Odd Fellows v. Poole.*[59] The complainants, who were the surviving members of the Lodge, filed a petition in the chancery court seeking a dissolution of the Lodge and a distribution of the assets. The Lodge had not functioned since 1933.[60] The Court held that although the general rule is that a corporation can not be legally dissolved or have its charter surrendered unless it is done pursuant to the statute,[61] an equity court may in a proper case treat the corporation as dissolved even though no dissolution has occurred in the legal sense, and a dissolution may be implied by consent of the members when meetings have been voluntarily discontinued and activities have ceased.[62] In a case such as this where all the members agree to cease operations and the petition is filed by the surviving members, there seems sufficient reason for equity to distribute the assets and treat the corporation as dissolved. Dissolution will be the ultimate effect of the decree which distributes the assets and the operations have already ceased.

In the case of *Hyman Mercantile Co. v. Kiersky,*[63] a bill was filed in the chancery court by minority stockholders against a mercantile corporation, two of its stockholders, and officers of the corporation, to have the company dissolved and a receiver appointed. From the granting of the decree for which the complainants prayed, the corporation appealed. The Court pointed out that the affairs of a corporation are managed by its stockholders and officers and that minority stockholders who have grievances at the way affairs of the corporation are being managed should first make application to the officers to have the correction made. If this fails,

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of such court, wound up and its assets distributed according to the rights of the creditors first and then ratably what is left among the stockholders according to their rights. . . ."

[58]Miss. Code Ann. (1930) § 4174 provides: "When a bill is filed as provided in the foregoing section the chancery court shall have full jurisdiction to appoint a receiver as in other cases in equity to take charge of the assets."

[59]190 Miss. 798, 1 So.(2d) 780 (1941).

[60]In Oct. 1933 the Lodge was composed of five members, two of whom are the complainants in this case. They met and agreed not to pay further dues and to divide the assets equally. It was admitted in the pleadings that the Lodge ceased to function as a fraternal organization in or about 1933.

[61]Miss. Code Ann. (1930) § 4170.

[62]190 Miss. 798, 804, 1 So.(2d) 780, 781 (1941). The agreement which as made in this case concerning dissolution was effective to determine the status of the parties as tenants in common. This is what their status would have been under the statute which provides: "On dissolution of any corporation, either by judgment or otherwise, all its real and personal estate shall be vested in the stockholders therein, in their respective proportions, who shall hold the same as tenants in common; but this section shall not extend to any property except that which the corporation might lawfully have held without forfeiting the same to the state. Debts due to and from the corporation shall be extinguished by its dissolution, but shall be a charge upon its property." Miss. Code Ann. (1930) § 4172.

[63]4 So.(2d) 881 (Miss. 1941).

then the minority stockholders have the right to resort to equity under the principles laid down in the *Brent* case.[64] However, the appellant in this case argued that code sections 4173, 4174, 4175,[65] which were enacted after the *Brent* case was decided, became the exclusive authority for the dissolution and winding up of the affairs of a corporation at the suit of one or more of the stockholders or creditors.[66] The Court said that the statutory authority provided a method by which the stockholder or creditor had the right to resort to the chancery court for the dissolution of the corporation and the liquidation of its affairs when it "becomes insolvent or ceases to be a going concern, or while insolvent sells its franchises in whole or in part."[67]

Concerning the question as to whether or not the statutes are now the exclusive authority for the dissolution and winding up of the affairs of a corporation,[68] the Court, in reversing the case, ruled:

> "We do not decide this question because under the Brent case, and the other authorities cited, in order for minority stockholders in a domestic corporation to put an end to the corporation there must be either insolvency or mismanagement which must lead to insolvency and the evidence is overwhelming to the effect that the present management is not leading to insolvency."[69]

It is these questions of what may be done under the statute and whether or not the holding in the *Brent* case has been modified by that statute which remain not completely settled today. Although it has been held that the jurisdiction of equity when conferred by statutory authority may be limited to the terms of the statue, it seems to have been the purpose of the statute to enlarge rather than to restrict the power of the equity court. There seems to be no indication that this statute became the exclusive authority and limited the inherent power already being exercised by equity.

The section[70] which provides for the decree of dissolution by an equity court when the requirements of the statute have been met provides little difficulty. There may be, however, some question of interpretation of the following provision:

> "If, upon the hearing of the petition, it shall appear that the holders of two-thirds of the stock have voted for said dissolution, and that it would be to the best interest of all parties in interest that the corporation be dissolved, then. . . ."[71]

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[64]A lengthy exerpt from the opinion in the *Brent* case is quoted by Judge Anderson, who wrote the opinion in the *Hyman Mercantile Co.* case.

[65]MISS. CODE ANN. (1930) §§ 4173, 4174, 4175.

[66]4 So.(2d) at 883.

[67]MISS. CODE ANN. (1930) § 4173.

[68]The Court refers to the dissolution of a corporation and the winding up of the affairs without drawing a distinction between the two remedies.

[69]4 So.(2d) at 884.

[70]MISS. CODE ANN. (1930) § 4170.

[71]*Ibid.*

The point may be raised as to what would be a two-thirds vote when there are several classes of stock involved; and further, to what extent, if any, does "and that it would be to the best interest of all parties in interest" vest a discretion in the chancellor?[72]

The major difficulties arise in determining what may be done under the section providing for liquidation by the chancery court.[73] Even if it should be decided that this section becomes the exclusive authority for equity's power to wind up the affairs of a corporation, the *Brent* case seems sufficient ground for placing on that statute a liberal interpretation. Equity is given statutory authority to wind up the affairs of a corporation and to distribute its assets when the corporation becomes insolvent or ceases to be a going concern or while insolvent sells its franchises in part or in whole. Clearly, this statute gives to equity courts the power of liquidation when the corporation is insolvent or while insolvent sells its franchises in whole or in part. But the Court may find difficulty in determining the meaning of the word "insolvent". There may be some question as to whether or not the corporation must be in a state of insolvency as defined by an excess of liabilities over assets or as an inability to meet current debts as they occur in the usual course of business.[74]

Another question arises as to when a corporation ceases to be a going concern, as required by the statute. The ground itself had been recognized as an exceptional circumstance when equity had inherent power to wind up the affairs of a corporation and now statutory authority makes this exception clearly the law in Mississippi. This clause should be broad enough to include the situation when the corporation can no longer attain the purpose for which it was created, for the "going concern" may be said to be at an end then. And from the language used in the *Hyman Mercantile Co.* case this language must be broad enough to include the situation where the management of the corporation is about to bring about insolvency. In that case, the *Brent* case was referred to as holding that there must be either insolvency or *mismanagement which must lead to insolvency,* and apparently the Court thought that the statute was broad enough to include the *Brent* case, which had been decided prior to the passage of the statute. Further the Court intimated in the *Hyman Mercantile Co.* case that if there had either been a claim of insolvency or evidence to the effect that the present management of the corporation was leading to insolvency, equity would have had the power to grant the relief sought. And if the equity court has the power to wind up the affairs of a corporation when the management is being so conducted as to be leading to insolvency, surely

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[72]It seems doubtful that the Legislature intended to vest any discretion in the chancellor as to the granting of the remedy set forth when the stockholders fulfill the requirements of the statute for dissolution.

[73]Miss. Code Ann. (1930) § 4173.

[74]19 C. J. S. (1940) 1083, § 1372.

this power would extend to cover those situations where fraud was charged and the equitable remedy sought on that ground.

There is nothing in the *Hyman Mercantile Co.* case which indicates that the *Brent* case could not have been decided in the same manner under the statute of today. Judge Reed's well-written opinion in the *Brent* case may be said to be based upon the fact that equity should give relief when the remedy in the law court is inadequate and that dissolution in the sense of winding up the affairs of the corporation would be granted when it was necessary to make the relief entirely adequate. It is true that the *Brent* case goes rather far in giving equity jurisdiction over corporations, but there seems to be sufficient reason for this case to stand as good authority concerning equity's power over corporations.[75]

The fact that a corporation owes its life to the sovereign power and dissolution and termination should be brought about only in a proper proceeding by that power may be argued as ground for refusing equity jurisdiction over quasi corporations or some corporations whose franchise was granted by a special legislative act. But today, when corporations are organized under general laws, this objection seems wholly theoretical. The management of corporations today is in the hands of the stockholders, who have a pecuniary interest in that operation. They do not undertake to carry on the business indefinitely regardless of the condition of the affairs.[76] Public policy does not require that they continue the existence of the company at a loss, but on the other hand, it is clearly for the public welfare that the corporation should cease to exist as soon as it appears that it can not be successfully continued.

Without a doubt, the majority of the stockholders have the right to dispose of the property of the corporation, distribute its assets and to cease the operations of the company, when they act in good faith and for the benefit of the stockholders. And if the majority of the stockholders allow the directors to manage the business in such a manner as will be ruinous to the company, or should fraud be present, or should the purpose for which the corporation was organized become impossible to attain, or should the operations of the corporation be abandoned, why should not the minority stockholders, or any stockholder, be entitled to seek remedy in an equity court? That course is the only one which could give an adequate, full, and complete remedy. And there seems to be no valid reason why this remedy, extended when no other remedy is available, should apply not only to a distribution of the assets and to treatment of the corporation as dissolved but should extend to the dissolution of the corporation itself. This would be

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[75]It was approved in the *Hyman Mercantile Co.* case as authority for holding that an equity court may dissolve a corporation when it is insolvent or when the management is leading to insolvency.

[76]This was the argument of the appellant in the *Brent* case. 103 Miss. 876, 878, 60 So. 1018 (1912).

the practical result anyway when the assets and the property of the corporation are distributed and the affairs concluded.[77]

> "As far as possible, courts of equity should adapt their practice to the existing conditions of the business world, and apply their jurisdiction to the changed conditions and cases arising thereunder, and should not too strictly adhere to forms and rules, especially under different circumstances, and decline to administer justice and enforce rights for which there is no other remedy."[78]

Edythe Evelyn Gandy

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[77]In State Savings Ass'n. v. Kellogg, 52 Mo. 583 (1873), Judge Wagner said: "When the corporation was utterly penniless, for what end or object did it continue? What good did it do to the creditor to be told that there was the naked shadow, but that the substance was gone? The corporation for all essential purposes was as effectually dissolved as if a solemn judgment of the court had been pronounced to that effect."

[78]Brent v. Sawmill Co., 103 Miss. 856, 876, 60 So. 1018, 1021 (1912), as quoted by the Mississippi Court from the opinion in Gibbs v. Morgan, 9 Ida. 100, 72 Pac. 733 (1903).

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